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No. 82-640

# In the Supreme Court of the United States

**October Term, 1982**

STATE OF KANSAS, ex rel., Perry Murray and Robert T. Stephan,
*Appellees,*

vs.

HAROLD R. PALMGREN, et al.,
*Appellants.*

ON APPEAL FROM THE SUPREME COURT OF KANSAS

## JURISDICTIONAL STATEMENT

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## QUESTIONS PRESENTED

**1. Whether the Kansas Open Meetings Act, on its face and as construed by the Kansas Supreme Court, comports with the requirements of the First and Fourteenth Amendments to the Constitution.**

**2. Whether the lower courts' refusal to allow Appellants to present the defense of "prosecutorial discrimination" denies them rights guaranteed under the Fourteenth Amendment to the Constitution.**

## PARTIES TO THE PROCEEDINGS

APPELLEES ARE:

Perry Murray, County Attorney of Thomas County, Kansas, and

Robert T. Stephan, Attorney General of Kansas

APPELLANTS ARE:

Harold R. Palmgren

William J. Randall

John A. Renner

Samuel Friesen

Eugene J. Karlin

Lloyd E. Theimer

Harold E. Upchurch

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ON APPEAL FROM THE SUPREME COURT OF KANSAS

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## JURISDICTIONAL STATEMENT

The primary issue presented is whether a State statute, as construed by the Kansas Supreme Court, which forbids private discussion of public business by public officials, violates First Amendment rights of free speech and association.

## OPINIONS BELOW

The Findings and Conclusions of the state trial court, and its Judgment Form, are not officially reported under Kansas practice. The Opinion of the Kansas Supreme Court is reported at 231 Kan. 524, 646 P.2d 1091. The Findings and Conclusions, Judgment Form, Opinion, and Denial of Motion for Rehearing are set forth in the Appendix.

## JURISDICTION

The action below was filed by the Kansas Attorney General and Thomas County Attorney on March 21, 1980, alleging that Appellants, former County Commissioners or Hospital Trustees of Thomas County, Kansas, knowingly violated the Kansas Open Meetings Act, K.S.A. 75-4317 et seq., on eight separate occasions, and seeking civil penalties of $500.00 from each Defendant for each occasion.

The state trial court, rejecting Appellants' contention that KOMA was vague and overbroad, and after refusing to allow Appellants to present any evidence in support of their asserted defense to prosecutorial discrimination, held that Appellants had attended "secret" meetings on three occasions, and fined Appellants. Two of Appellants' co-defendants were found not to have violated the Act. The trial court's decision was rendered August 7, 1981.

The Opinion of the Kansas Supreme Court affirming the trial court, was filed June 11, 1982. The Order of the Kansas Supreme Court denying Appellants' Motion for Rehearing, was filed July 15, 1982. Appellants filed their Notice of Appeal in the Kansas Supreme Court on September 13, 1982.

Jurisdiction to review the decision of the Kansas Supreme Court by direct appeal is conferred on this Court by 27 U.S.C. §1257(2). See, e.g., *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 43 L.Ed.2d 328, 95 S.Ct. 1029 (1975); *Cramp v. Board of Public Instruction*, 368 U.S. 278, 7 L.Ed.2d 285, 82 S.Ct. 275 (1961); *Re Groban*, 352 U.S. 330, 1 L.Ed.2d 376, 77 S.Ct. 510 (1957); *Torcaso v. Watkins*, 367 U.S. 488, 6 L.Ed.2d 982, 81 S.Ct. 1680 (1961); and *Coates v. Cincinnati*, 402 U.S. 611, 29 L.Ed.2d 214, 91 S.Ct. 1686 (1971).

## STATUTES INVOLVED

The statutes pertinent to this appeal are contained in the Kansas Open Meetings Act, K.S.A. 75-4317 et seq. The provisions of that Act in effect at the time of the alleged violations, are as follows:

"75-4317. Open meetings declared policy of state. (a) In recognition of the fact that a representative government is dependent upon an informed electorate, it is declared to be the policy of this state that meetings for the conduct of governmental affairs and the transaction of governmental business be open to the public.

(b) It is declared hereby to be against the public policy of this state for any such meeting to be adjourned to another time or place in order to subvert the policy of open public meetings as pronounced in subsection (a).

"75-4317a. Meeting defined. As used in this act, 'meeting' means any prearranged gathering or assembly by a majority of a quorum of the membership of a body or agency subject to this fact (sic) for the purpose of discussing the business or affairs of the body or agency.

"75-4318. Meetings of state and subdivisions open to public; exceptions, secret ballots; notice; agenda, cameras, photographic lights, recording devices. (a) Except as otherwise provided by state or federal law or by rules of the house or senate, and except with respect to any impeachment inquiry or other impeachment matter referred to any committee of the house of representatives prior to the report of such committee

to the full house of representatives, all meetings for the conduct of the affairs of, and the transaction of business by, all legislative and administrative bodies and agencies of the state and political and taxing subdivisions thereof, including boards, commissions, authorities, councils, committees, subcommittees and other subordinate groups thereof, receiving or expending and supported in whole or in part by public funds shall be open to the public and no binding action by such bodies shall be by secret ballot, but any administrative body that is authorized by law to exercise quasi-judicial functions shall not be required to have open meetings when such body is deliberating matters relating to a decision involving such quasi-judicial functions.

(b) Notice of the date, time and place of any regular or special meeting of a public body designated hereinabove shall be furnished to any person requesting such information, except that:

(1) If notice is requested by petition, the petition shall designate one person to receive notice on behalf of all persons named in the petition, and notice to such person shall constitute notice to all persons named in the petition; and

(2) If notice is furnished to an executive officer of an employees' organization or trade association, such notice shall be deemed to have been furnished to the entire membership of such organization or association.

(c) It shall be the duty of the presiding officer or other person calling the meeting, if the meeting is not called by the presiding officer, to furnish the information required by subsection (b).

(d) Prior to any meeting hereinabove mentioned, any agenda relating to the business to be transacted at such meeting shall be made available to any person requesting said agenda.

(e) The use of cameras, photographic lights and recording devices shall not be prohibited at any meeting mentioned by subsection (a) of this section, but such use shall be subject to reasonable rules designed to insure the orderly conduct of the proceedings at such meeting.

"75-4319. Closed or executive meetings, when; no binding action. (a) Upon formal motion made, seconded and carried, all bodies and agencies subject to this act may recess, but not adjourn, open meetings for closed or executive meetings. Any motion to recess for a closed or executive meeting shall include a statement of (1) the justification for closing the meeting, (2) the subjects to be discussed during the closed or executive meeting and (3) the time and place at which the open meeting shall resume. Such motion, including the required statement, shall be recorded in the minutes of the meeting and shall be maintained as a part of the permanent records of the body or agency. Discussion during the closed or executive meeting shall be limited to those subjects stated in the motion.

(b) No subjects shall be discussed at any closed or executive meeting, except the following: (1) Personnel matters of non-elected personnel;

(2) consultation with an attorney for the body or agency which would be deemed privileged in the attorney-client relationship;

(3) consultations with the representative of the body or agency in employer-employee negotiations;

(4) confidential data relating to financial affairs or trade secrets of corporations, partnerships, trusts, and individual proprietorships;

(5) matters relating to actions adversely or favorably affecting a person as a student, patient or resident of a public institution, except that any such person shall have the right to a public hearing if he or she so requests; and

(6) preliminary discussions relating to the acquisition of real property.

(c) No binding action shall be taken during closed or executive recesses, and such recesses shall not be used as a subterfuge to defeat the purposes of this act.

"75-4320. Penalties. (a) Any member of a body or agency subject to this act who knowingly violates any of the provisions of this act or who intentionally fails to furnish information as required by subsection (b) of K.S.A. 75-4318 shall be liable for the payment of a civil penalty in an action brought by the attorney general or county or district attorney, in a sum set by the court of not to exceed five hundred dollars ($500) for each violation. In addition, any binding action which is taken at a meeting not in substantial compliance with the provisions of this act shall be voidable in any action brought by the attorney general or county or district attorney in the district court of the county in which the meeting was held within ten (10) days of the meeting, and the court shall have jurisdiction to issue injunctions or writs of mandamus to enforce the provisions of this act.

(b) Civil penalties sued for and recovered hereunder by the attorney general shall be paid into the state general fund. Civil penalties sued for and recovered hereunder by a county or district attorney shall be paid into the general fund of the county where the proceedings were instigated."

## STATEMENT

In 1972, the Kansas Legislature adopted the Kansas Open Meetings Act, a so-called "sunshine" law. In its original form, knowing violations of the Act were punishable as Class C misdemeanors (1972 Session Laws of Kansas, Chap. 319, §4). By the time of the alleged violations by Appellants in November, 1979, the Act had been amended several times, the changes here material being the addition of a definition of "meeting" (K.S.A. 75-4317a), and the punishment for a knowing violation being changed to a "civil penalty" of not to exceed $500.00 for each violation (K.S.A. 75-4320(a)).

Although the Kansas Attorney General had issued 52 opinions construing the Act, and on numerous occasions the Attorney General states in those opinions that public officials had violated the Act, prior to the filing of the instant action against Appellants, the Attorney General had commenced only one action under the Act and did not in that case seek any penalties.

In November, 1979, the time of the alleged violations of the Act, Appellants Randall, Renner and Palmgren were the three County Commissioners of Thomas County, Kansas. The office of County Commissioner is a part-time elective office paying a small salary. Renner and Palmgren were farmers and Randall was in the heating and

air conditioning business. Appellants Upchurch, Theimer, Karlin and Friesen were members of the Board of Trustees of the Thomas County Hospital, a county-owned institution. Trustees are appointed by the Commissioners for definite terms and receive no compensation for their services. By November, 1979, two previous efforts to build a new Thomas County Hospital were thwarted by decisions of the Kansas Supreme Court that various bond and licensing laws had been violated. See, *Pratt v. Board of Thomas County Comm'rs*, 226 Kan. 333, 597 P.2d 664 (1979), and *Thomas County Taxpayers Ass'n v. Finney*, 223 Kan. 434, 573 P.2d 1073 (1978).

Citizens of Thomas County devoted to building a new hospital then determined to build a non-profit hospital and began soliciting donations for that purpose. Appellants enraged those citizens by taking the position that the possibility of remodeling the existing Thomas County Hospital should be investigated. Those citizens then deluged the Attorney General's office with complaints that Appellants were violating the Kansas Open Meetings Act, and a large delegation of those citizens, among them the Thomas County Attorney, went to Topeka to press those complaints with the Attorney General. Although charged with the duty to advise local officials, neither the Attorney General nor County Attorney ever informed Appellants that such complaints were being made, and these officers did not attempt to instruct Appellants as to what constituted a violation of the Act. In fact, the County Attorney had refused to represent the Trustees, disregarding an opinion of the Attorney General that he was obligated to do so without additional compensation.

Responding to this pressure by the citizens favoring a private, non-profit hospital, the Attorney General launched an intensive investigation, sending numerous agents of the

Kansas Bureau of Investigation to Thomas County for that purpose. On March 21, 1980, the Attorney General and County Attorney, filed a Petition alleging that Appellants and two co-defendants had knowingly violated the Kansas Open Meetings Act on eight separate occasions, and seeking civil penalties of $500.00 from each Appellant involved for each alleged violation. Simultaneously, the Attorney General issued a press release to the news media. Subsequently, Appellees filed an Amended Petition (R., Vol. 1, p.73) containing substantially the same allegations.

In both their Answer to the original Petition (R., Vol. 1, p.36), and Answer to Amended Petition (R., Vol. 1, p.179), Appellants asserted that the Kansas Open Meetings Act is unconstitutional as denying them that due process of law guaranteed by the Constitution and that Appellees were seeking to selectively and discriminatorily enforce the Act against Appellants in violation of their rights under the Fourteenth Amendment. Additionally, Appellants filed a Motion to Dismiss (R., Vol. 1, p.99), with supporting Brief (R., Vol. 1, p.100), arguing that the Act is so vague and overbroad as to deny them due process of law, and their rights under the First Amendment, and alternatively arguing that the Act is penal in nature and should be strictly construed in Appellants' favor.

On October 9, 1980, the trial court heard oral arguments on the Motion to Dismiss, and ruled that the Act is penal in nature as to Appellants, but refused to rule on the constitutional issues, or the issues of interpretation. Not until June 15, 1981, the day before trial, did the trial court decline to hold the Act unconstitutional, and at the same time, the trial court held that prosecutorial discrimination is not a defense in Kansas, and instructed Appellants' counsel not to tender any testimony in support of such defense (R., Vol. 3, Transcript of Pretrial Proceedings

of June 15, 1981). The trial court further refused to admit into evidence certain exhibits tendered by Appellants during the trial in support of the defense of prosecutorial discrimination.

In the meantime, the parties proceeded with discovery and several pretrial conferences. The depositions of all of the Defendants, including Appellants, were taken by Appellees. Appellants sought, by a Request for Production (R., Vol. 1, p.40), to inspect certain documents within the control of the Attorney General, in support of their asserted defense of prosecutional discrimination. The trial court granted Appellees' Motion for Protective Orders and refused Appellants access to such documents (R., Vol. 1, p.195). Appellants then filed interrogatories seeking certain statistical information, within the Attorney General's control, in support of the defense of prosecutorial discrimination. Again, the trial court granted Appellees' Motion for Protective Order and refused to compel the Attorney General to supply such information (R., Transcript of Formal Pretrial Proceedings, p.23).

After the trial beginning June 16, 1981, the trial court, despite its earlier ruling that the Kansas Open Meetings Act is penal in nature as applied to Appellants, liberally construed the Act in favor of Appellees and found that Appellants Renner, Randall, Palmgren and Friesen "knowingly" violated the Act on one occasion, and that Appellants Karlin, Theimer and Upchurch "knowingly" violated the Act on three occasions, notwithstanding the trial court's finding that Appellants had not intentionally violated the Act. Each of the Appellants was fined.

Appellants then timely appealed to the Kansas Court of Appeals (R., Vol. 2, p.194). The appeal, on the joint motion of the parties, was transferred to the Kansas Su-

preme Court. After briefs and oral argument, that Court affirmed in an opinion filed June 11, 1982, and now reported at 231 Kan. 524, 646 P.2d 1091. On July 15, 1982, the Court denied Appellants' Motion for Rehearing, without opinion.

## THE QUESTIONS ARE SUBSTANTIAL

**I. The Courts below erred in holding that the Kansas Open Meetings Act was neither unconstitutionally vague or overbroad, and in liberally construing the Act.**

The Kansas Open Meeting Act applies to virtually every local governmental body or agency in the State. Every city council or commission, board of county commissioners, school board, board of township trustees and hospital board, are covered by the Act. Thousands of local board members, many or most of them unpaid, amateurs volunteers, are directly affected. Many States have similar laws.

While the purpose of the Act, providing citizens access to public business, is important, it is generally conceded to have no constitutional underpinnings, and when that purpose, no matter how laudable, conflicts with a public official's rights to free speech and assembly, and denies him due process of law, the Act must yield.

**a. The Kansas Open Meetings Act, as construed by the Courts below, is overbroad and infringes on Appellants' rights under the First and Fourteenth Amendments.**

Appellants' argument below on overbreadth was contingent. That is, Appellants conceded that if the Kansas

courts would construe the Act to require only those "meetings for the conduct of the affairs of, and the transaction of business by" the governmental body in question, be open to the public, as Appellants urged and K.S.A. 75-4317 and 75-4318 specifically state, then the Act is not overbroad. Appellees consistently argued that the Act should be liberally construed so that all "meetings", that is, all prearranged gatherings by a majority of a quorum of a public body for the purpose of mere *discussion* of public business or affairs, must be open to the public, whether governmental affairs are conducted or governmental business transacted. In other words, the plain requirement of K.S.A. 75-4317 and 75-4318 that such affairs be conducted and such business transacted, should be ignored.

The trial court, even though it had held the Act to be penal in nature as applied to Appellants (R., Vol. 1, p.193), adopted the liberal construction urged by Appellees, and found that the State need only prove, and had only proved, prearranged gatherings by Appellants for the purpose of *discussing* business or affairs on the three occasions in question (R., Vol. 2, pp.185, 186). The trial court did *not* find governmental affairs were conducted and governmental business transacted on any of the three occasions.

The Kansas Supreme Court disposed of Appellants' overbreadth argument in one paragraph, which reads as follows:

> "The challenge for overbreadth can be easily dismissed. Appellants argue the KOMA has a potential inhibiting effect on the 'rights of public officials to assemble and discuss public affairs.' It is urged citizens have the right to unfettered discussion of governmental affairs in private while retaining anonymity. Appellants' claim reveals a basic misconception

regarding the nature of a public official's position. The First Amendment does indeed protect private discussions of governmental affairs among citizens. *Everything changes, however, when a person is elected to public office.* Elected officials are supposed to represent their constituents. In order for those constituents to determine whether this is in fact the case they need to know how their representative has *acted* on matters of public concern. Democracy is threatened when public *decisions* are made in private. Elected officials have no constitutional right to *conduct* governmental affairs behind closed doors. Their duty is to inform the electorate, not hide from it. *The KOMA places no constraints on purely private discussions by public officials. It regulates only the conduct of public business.* As such the KOMA is not unconstitutionally overbroad." (231 Kan. at pp.533-534, App. C, p.27a; emphasis supplied.)

Analyzing the above reasons in reverse order, it may be true, as the Kansas Supreme Court has held on other occasions,[1] that a statute which is facially overbroad may be authoritatively construed and restricted to cover only conduct which is not constitutionally protected. On its face, the Court did authoritatively and restrictively interpret the Act as regulating only the *conduct* of public business, and as prohibiting the making of public *decisions* in private and the *conduct* of governmental affairs behind closed doors. However, had that restrictive interpretation in fact been applied, this case would have been reversed, for, as above stated, the trial court had held that Appellees need show, and had shown, only that a prearranged *dis-*

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1. See, e.g., *State v. Huffman*, 228 Kan. 186, 192, 612 P.2d 630 (1980).

*cussion* of public business or affairs had occurred, and the trial court did not find that governmental affairs were conducted, or public business transacted, on any of the three occasions in question (R., Vol. 2, p.183). However, Appellants' convictions were affirmed because the Kansas Supreme Court, after leaving the overbreadth question, in fact interpreted the Act as prohibiting the mere private discussion, as well as the conduct or transaction, of public business by public officials. Syllabus 8 of the Court's opinion read as follows:

> "8. PUBLIC OFFICERS AND EMPLOYEES—Kansas Open Meetings Act. All prearranged gatherings by a majority of a quorum of legislative and administrative bodies, agencies of the state, political and taxing subdivisions thereof, including boards, commissions, authorities, councils, committees, subcommittees and other subordinate groups thereof, receiving or expending and supported in whole or in part by public funds shall be open to the public when the purpose of the gathering is to *discuss, conduct or transact* the business or affairs of the body or agency." (231 Kan. at p.524, App. C, p.13a; emphasis supplied.)

Thus, the Kansas Supreme Court has authoritatively, but not restrictively, interpreted the Act to deny Appellants the right to merely discuss governmental business in private among themselves. The Court, while conceding that the First Amendment does indeed protect private discussions of governmental affairs among citizens, would justify denying this same protection to Appellants because ". . . Everything changes, however, when a person is elected to public office." Significantly, the Kansas Supreme Court cites no authority for this proposition. It is well established that a person does not forfeit or

diminish his constitutional rights by election or appointment to public office or by accepting public employment.[2]

Legislation is unconstitutionally broad where it is susceptible of application to those freedoms guaranteed by the First Amendment.[3] This Court has held that in determining whether legislation is overbroad, it must balance the governmental interests sought to be advanced by the State against threatened First Amendment freedoms.[4] However, even though the governmental purpose is legitimate and substantial, such purpose cannot be pursued by means which stifle fundamental liberties when the end can

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2. See, e.g., *Cramp v. Board of Public Instruction*, 368 U.S. 278, 7 L.Ed.2d 285, 82 S.Ct. 275 (1961); *Torcaso v. Watkins*, 367 U.S. 488, 6 L.Ed.2d 982, 81 S.Ct. 1680 (1961); *Keyishian v. Board of Regents*, 385 U.S. 589, 17 L.Ed.2d 629, 87 S.Ct. 675 (1967); *Abood v. Detroit Board of Education*, 431 U.S. 209, 52 L.Ed.2d 261, 97 S.Ct. 1782 (1977); *Givhan v. Western Line Consolid. Sch. Dist.*, 439 U.S. 410, 58 L.Ed.2d 619, 99 S.Ct. 693 (1979). In *Bond v. Floyd*, 385 U.S. 116, 17 L.Ed.2d 235, 87 S.Ct. 339 (1966), this Court rejected the view that a State may curtail the First Amendment rights of one of its legislators to a greater degree than it might those of a private citizen. (385 U.S. at pp.132-133.) This Court held: ". . . while the State has an interest in requiring its legislators to swear to a belief in constitutional processes of government, surely the oath gives it no interest in limiting its legislators' capacity to discuss their views of local or national policy." (385 U.S. at p.135.) This Court held, in *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 55 L.Ed.2d 707, 98 S.Ct. 1407 (1978), citing *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 33 L.Ed.2d 212, 92 S.Ct. 2286 (1972), that: "In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue." (435 U.S. at pp.784-785.)

3. See, e.g., *Coates v. Cincinnati*, 402 U.S. 611, 29 L.Ed.2d 214, 91 S.Ct. 1686 (1971); *Grayned v. Rockford*, 408 U.S. 104, 33 L.Ed.2d 222, 92 S.Ct. 2294 (1972); *Lewis v. New Orleans*, 415 U.S. 130, 39 L.Ed.2d 214, 94 S.Ct. 970 (1974).

4. *Keyishian v. Board of Regents*, 385 U.S. 589, 17 L.Ed.2d 629, 87 S.Ct. 675 (1967); *Colten v. Kentucky*, 407 U.S. 104, 32 L.Ed.2d 584, 92 S.Ct. 1953 (1972); *Grayned v. Rockford*, 408 U.S. 104, 33 L.Ed.2d 222, 92 S.Ct. 2294 (1972); *Procunier v. Martinez*, 416 U.S. 396, 40 L.Ed.2d 224, 94 S.Ct. 1800 (1974); *Erznoznik v. Jacksonville*, 422 U.S. 205, 45 L.Ed.2d 125, 95 S.Ct. 2268 (1975).

be more narrowly achieved.[5] Here the Kansas Supreme Court stated the interests sought to be advanced as granting the public the right to know how their representatives have *acted* on matters of public concern, and preventing public *decisions* from being made and governmental affairs *conducted* in private. (231 Kan. at p.534, App. C, p.27a.) However, those legitimate ends could have been achieved by construing the Act as prohibiting only the conduct of governmental affairs and transaction of governmental business in private, without infringing on Appellants' rights to privately discuss such business and affairs.

Here the State concedes that it cannot constitutionally forbid its citizens to assemble and privately discuss public business and affairs. May the State do so when those citizens happen to be public officials? This Court has held that a public employee or officer may advocate the forcible overthrow of the government, so long as he takes no action to that end.[6] If the State may not punish a public official for advocating its forcible overthrow, may it constitutionally punish Appellants for merely discussing public affairs or business in private among themselves?

**b. The Kansas Open Meetings Act is so vague and indefinite as to deny Appellants due process of law as guaranteed by the Fourteenth Amendment.**

This Court has stated at least three rationales for the doctrine that a vague statute denies due process: (1) such a statute does not give the citizen fair notice or warning

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5. *Shelton v. Tucker*, 364 U.S. 479, 488, 5 L.Ed.2d 231, 237, 81 S.Ct. 247 (1960); *Keyishian v. Board of Regents*, 385 U.S. 589, 17 L.Ed.2d 629, 87 S.Ct. 675 (1967).

6. See, e.g., *Yates v. United States*, 354 U.S. 298, 1 L.Ed.2d 1356, 77 S.Ct. 1064 (1957); *Keyishian v. Board of Regents*, 385 U.S. 589, 17 L.Ed.2d 629, 87 S.Ct. 675 (1967).

as to what conduct is expected or prohibited;[7] (2) certainty is required to guide judges and jurors as to what is prohibited and what is not in each particular case;[8] and (3) vagueness may permit an arbitrary and discriminatory enforcement of the law.[9] When the statute in question is penal in nature, the "void for vagueness" doctrine applies with special force.[10]

If the statute in question threatens or potentially inhibits the exercise of First Amendment freedoms, stricter standards of permissible vagueness apply,[11] and government may regulate in this area only with "narrow speci-

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7. See, e.g., *Connally v. General Construction Co.*, 269 U.S. 385, 70 L.Ed. 322, 46 S.Ct. 126 (1926); *Cramp v. Board of Public Instruction*, 368 U.S. 278, 7 L.Ed.2d 285, 82 S.Ct. 275 (1961); *Lanzetta v. Washington*, 405 U.S. 313, 31 L.Ed.2d 258, 92 S.Ct. 993 (1972); *Colautti v. Franklin*, 439 U.S. 379, 58 L.Ed.2d 596, 99 S.Ct. 675 (1979).

8. See, e.g., *Musser v. Utah*, 333 U.S. 95, 92 L.Ed. 562, 68 S.Ct. 397 (1948); *Bouie v. Columbia*, 378 U.S. 347, 12 L.Ed.2d 894, 84 S.Ct. 1697 (1964); *Giaccio v. Pennsylvania*, 382 U.S. 399, 15 L.Ed.2d 447, 86 S.Ct. 518 (1966).

9. See, e.g., *Papachristou v. City of Jacksonville*, 405 U.S. 156, 31 L.Ed.2d 110, 92 S.Ct. 839 (1972); *Smith v. Goguen*, 415 U.S. 566, 39 L.Ed.2d 605, 94 S.Ct. 1242 (1974); *Colautti v. Franklin*, 439 U.S. 379, 58 L.Ed.2d 596, 99 S.Ct. 675 (1979).

10. See, e.g., *Winters v. New York*, 333 U.S. 507, 92 L.Ed. 840, 68 S.Ct. 665 (1948). The same strict standard applies whether the penalties are criminal or civil. *Champlin Refining Co. v. Corporation Com.*, 286 U.S. 210, 76 L.Ed. 1062, 52 S.Ct. 559, 86 A.L.R. 403 (1932); *Cramp v. Board of Public Instruction*, 368 U.S. 278, 7 L.Ed.2d 285, 82 S.Ct. 275 (1961); *Giaccio v. Pennsylvania*, 382 U.S. 399, 15 L.Ed.2d 447, 86 S.Ct. 518 (1966); *Keyishian v. Board of Regents*, 385 U.S. 589, 17 L.Ed.2d 629, 87 S.Ct. 675 (1967).

11. See, e.g., *Scull v. Commonwealth of Virginia*, 359 U.S. 344, 3 L.Ed.2d 865, 79 S.Ct. 838 (1959); *Smith v. California*, 361 U.S. 147, 4 L.Ed.2d 205, 80 S.Ct. 215 (1959); *Cramp v. Board of Public Instruction*, 368 U.S. 278, 7 L.Ed.2d 285, 82 S.Ct. 275 (1961); *Ashton v. Kentucky*, 384 U.S. 195, 16 L.Ed.2d 469, 86 S.Ct. 1407 (1966); *Colautti v. Franklin*, 439 U.S. 379, 58 L.Ed.2d 596, 99 S.Ct. 675 (1979).

ficity."[12] Also, when First Amendment freedoms are involved, this Court will permit a defendant to raise the issue of a statute's vagueness or overbreadth as applied to other persons and situations not before the Court,[13] and accordingly, this Court considers purely hypothetical applications of a challenged statute in determining its vagueness or overbreadth.[14]

In the present case, the trial court expressed the rather novel view that it would not be appropriate for a trial judge to declare the Act unconstitutional (R., Transcript of Pretrial Proceedings, June 15, 1981, at p.10). Nonetheless, the trial court harbored grave doubts that the Act was sufficiently certain to pass constitutional muster:

> "The editorial writers and the legislators hold up the Open Meetings Act as an absolutely necessary law for the governing of the public's business and maintain that it is the only way to enforce the right of the public to know what their public servants are doing when they're conducting the public's business. I

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12. See, e.g., *N.A.A.C.P. v. Button*, 371 U.S. 415, 9 L.Ed.2d 405, 83 S.Ct. 328 (1963); *Hynes v. Mayor of Oradell*, 425 U.S. 610, 48 L.Ed.2d 243, 96 S.Ct. 1755 (1976).

13. See, e.g., *Gooding v. Wilson*, 405 U.S. 518, 31 L.Ed.2d 408, 92 S.Ct. 1103 (1972); *N.A.A.C.P. v. Button*, 371 U.S. 415, 9 L.Ed.2d 405, 83 S.Ct. 328 (1963); *Grayned v. Rockford*, 408 U.S. 104, 33 L.Ed.2d 222, 92 S.Ct. 2294 (1972); *Broadrick v. Oklahoma*, 413 U.S. 601, 37 L.Ed.2d 830, 93 S.Ct. 2908 (1973); *Dombrowski v. Pfister*, 380 U.S. 479, 14 L.Ed.2d 22, 85 S.Ct. 1116 (1965); *Freedman v. Maryland*, 380 U.S. 51, 13 L.Ed.2d 649, 85 S.Ct. 734 (1965); *Bigelow v. Virginia*, 421 U.S. 809, 44 L.Ed.2d 600, 95 S.Ct. 2222 (1975).

14. See, e.g., *Cramp v. Board of Public Instruction*, 368 U.S. 278, 7 L.Ed.2d 285, 82 S.Ct. 275 (1961); *Keyishian v. Board of Regents*, 385 U.S. 589, 17 L.Ed.2d 629, 87 S.Ct. 675 (1967); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 31 L.Ed.2d 110, 92 S.Ct. 839 (1972); *Hynes v. Mayor of Oradell*, 425 U.S. 610, 48 L.Ed.2d 243, 96 S.Ct. 1755 (1976); *Colautti v. Franklin*, 439 U.S. 379, 58 L.Ed.2d 596, 99 S.Ct. 675 (1979); *Baggett v. Bullitt*, 377 U.S. 360, 12 L.Ed.2d 377, 84 S.Ct. 1316 (1964).

> don't believe there's any of us lawyers, public servants, judges, who would disagree *except when we run into the problems as has been very accurately described in the course of argument. There have been as many questions asked for which we would all like to have clear definitive answers. They do not seem to be available, at least to the people in this case.*" (Transcript of Pretrial Proceedings, June 15, 1981, at p.9.)

The "problems" and "questions" mentioned by the trial court are those raised by the parties as to the meaning of the Act. If, as the trial court commented, there are no answers to those questions and problems, it must follow that the Act is unconstitutionally vague.

At the time of Appellants' interrogatories, various Attorneys General had found it necessary to issue 52 opinions as to the meaning of the Act. They have not always been consistent as to how the Act should be interpreted.

The Kansas Supreme Court, in stating that the average person possessing ordinary common sense can understand the Act, cited Smoot and Clothier, *Open Meetings Profile: The Prosecutor's View*, 20 Washburn L.J. 241 (1981). However, in that article, Smoot and Clothier noted that the Attorney General is asked to opine "almost daily" about some aspect of the Act,[15] that ". . . the Act is wrought with ambiguities . . .",[16] that the Act has "weaknesses" and "lacks clarity",[17] and possesses "numerous problems of interpretation."[18] It is noteworthy that Mr. Smoot is a deputy Attorney General.

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15. 20 Washburn L.J. at p.242.
16. 20 Washburn L.J. at p.243.
17. 20 Washburn L.J. at p.257.
18. 20 Washburn L.J. at p.285.

The Act is vague as to the basic question of what gatherings of public officials must be open to the public. Appellants consistently have argued that the Act does not require all prearranged discussions by public officials of governmental affairs or business to be open to the public. Appellants pointed out that although the legislature, in 1977, defined "meeting" as a prearranged gathering or assembly of a majority of a quorum of the membership of a body or agency subject to the Act, for the purpose of discussing governmental affairs or business,[19] it did not require that such discussions be open to the public. Rather, the legislature required that only those meetings (discussions) ". . . for the conduct of the affairs of, *and* transaction of business by, . . . shall be open to the public. . ."[20] If the legislature had intended to require prearranged discussions to be open to the public, it would have simply required all "meetings" to be open to the public. It did not see fit to do so, and, in fact, when K.S.A. 75-4318 was amended in 1978, the legislature left intact the requirement of that section that only meetings for the conduct of the affairs and transaction of business be open to the public.[21]

Appellees consistently argued that to carry out the broad purposes of the Act, it should be liberally construed to require that all prearranged discussions of governmental affairs or business must be open to the public. In other words, the phrase ". . . for the conduct of the affairs of, and transaction of business of . . ." in K.S.A. 75-4318

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19. K.S.A. 75-4317a, quoted above.

20. K.S.A. 75-4318, quoted above.

21. Justice Fromme, in dissent, would interpret the Act in the manner urged by Appellants, and noted that prior to this case, the Court had never decided if all gatherings were subject to the penalties of the Act. See 231 Kan. at pp.541-542, App. C., pp.36a-39a.

should be excised from the Act and ignored. However, the Attorney General has conceded, in his Opinion No. 79-200, that the language of K.S.A. 75-4318 does suggest the more restrictive interpretation urged by Appellants. He further concedes, in that same Opinion, that the difference in language in K.S.A. 75-4317a and K.S.A. 75-4318, ". . . creates a good deal of confusion and mandates interpretation."

As we have seen, the Kansas Supreme Court adopted a broad, liberal construction of the Act and concluded that all prearranged gatherings for the purpose of discussing, conducting *or* transacting governmental business or affairs, must be open to the public.

Such a construction may impart certainty to the Act in future cases, but it creates the overbreadth problem above discussed, and cannot constitutionally be applied in this same case to Appellants.[22] Application of a broaden-

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22. In *Stromberg v. California*, 283 U.S. 359, 75 L.Ed. 1117, 51 S.Ct. 532, 73 A.L.R. 1484 (1931), this Court held it constitutionally impermissible for the California Supreme Court after the case had been tried, to excise vague and overbroad language from the statute and apply it to the appealing party when it was not so narrowed at the time of her conviction. This Court, in *Ashton v. Kentucky*, 384 U.S. 195, 198, 16 L.Ed.2d 469, 471-472, 86 S.Ct. 1407 (1966), and *Smith v. Goguen*, 415 U.S. 566, 580, 39 L.Ed.2d 605, 616, 94 S.Ct. 1242 (1974), noted the problems presented by a court applying a limiting construction in the very case in which a defendant has been convicted under a previously unnarrowed statute, and in *Bouie v. Columbia*, 378 U.S. 347, 352-353, 12 L.Ed.2d 894, 899, 84 S.Ct. 1697 (1964), this Court held:

> ". . . where *vague statutes* are concerned, it has been pointed out that the vice in such an enactment *cannot 'be cured in a given case by a construction in that very case placing valid limits on the statute,'* for 'the objection of vagueness is twofold: inadequate guidance to the individual whose conduct is regulated, and inadequate guidance to the triers of fact. *The former objection could not be cured retrospectively by a ruling either of the trial court or the appellate court,* though it might be cured for the future by an authoritative judicial gloss. . .' Freund, The Supreme Court and Civil Liberties, 4 Vand L Rev 533, 541 (1951). See Amsterdam, Note, 109 U Pa L Rev 67, 73-74, n 34." (Emphasis supplied.)

ing interpretation in the same case is even more constitutionally infirm.[23]

The definition of "meeting" contained in K.S.A. 75-4317a also contains uncertainties. It is not clear, for instance, whether the gathering or assembly, or purpose of discussing, or both, must be prearranged. The Act does not specify to what degree, if any, a public officer must participate in, or at least have knowledge of, such prearrangement, to be held liable under the Act. Nor does the Act state *whose* purpose of discussion governs: that of the person prearranging the gathering or the public officers attending. Must all of the public officers attending the prearranged gathering possess the requisite purpose, or is it sufficient if a majority or even one, intends to discuss public business? These issues were addressed to both Courts below and neither even discussed them.

**c. The Courts below erred in liberally construing the Act in favor of the State, and in indulging in a strong presumption in favor of the constitutionality of the Act.**

Appellants concede that normally this Court is not concerned with the interpretation given a state statute by the highest court of that State. But when this Court has enunciated principles mandated by the Constitution for determination of the constitutional validity of a statute, the state courts are not free to disregard those principles.

Here the trial court held that the Act, as applied to Appellants, is penal in nature, but failed to strictly construe the statute. The Kansas Supreme Court conceded, in effect, the penal nature of the Act and noted that it had

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23. *Bouie v. Columbia*, 378 U.S. 347, 352-353, 12 L.Ed.2d 894, 899-900, 84 S.Ct. 1697 (1964).

long adhered to the rule that a penal statute should be strictly construed. (231 Kan. at p.530, App. C, p.21a.) The Court further noted the rule that where First Amendment rights are involved, stricter standards of permissible statutory vagueness apply. (231 Kan. at p.533, App. C, p.26a.) Nonetheless, the Court held the Act is entitled to a broad, liberal interpretation in favor of the State, because the Act was enacted for the public benefit or protection. (Syllabus 4, App. C, p.12a, and 231 Kan. at pp. 530-531, App. C, pp.21a-23a.)

Appellants suggest that the exception stated by the Court below would engulf the rule, for *every* statute, criminal or civil, is enacted for the public benefit or protection. Thus, under the exception stated by the Kansas Supreme Court, no statute, even a criminal statute or one infringing on First Amendment freedoms, would ever be strictly construed against the State.

This Court has recognized no such exception. To the contrary, this Court has held that the rule of strict construction (called the rule of lenity) is rooted in fundamental principles of due process, and is not merely a convenient maxim of statutory construction.[24] Thus, the refusal of the Kansas Supreme Court to strictly construe the Act in Appellants' favor is in itself violative of due process.

In the course of its opinion, the Kansas Supreme Court stated the following rules to be applied in the present case:

> "Let us first consider the rules of construction on the constitutional challenge of a statute. We have stated on innumerable occasions the constitutionality of a statute is presumed; all doubts must be resolved in favor of its validity, and before a statute may be

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24. *Dunn v. United States*, 442 U.S. 100, 112, 60 L.Ed.2d 743, 754, 99 S.Ct. 2190 (1979).

stricken it must clearly appear there is a constitutional violation. We have gone on to say, in determining constitutionality, it is the court's duty to uphold the statute under attack rather than defeat it. If there is any reasonable way to construe the statute as constitutionally valid, it should be done. Statutes are not stricken unless the infringement of the superior law is clear beyond a reasonable doubt. *Von Ruden v. Miller*, 231 Kan. 1, 642 P.2d 91 (1982); *In re Brooks*, 228 Kan. 541, 543, 618 P.2d 814 (1980); *State v. Huffman*, 228 Kan. 186, 189, 612 P.2d 630 (1980); *Colby Distributing Co. v. Lennen*, 227 Kan. 179, 186-87, 606 P.2d 102 (1980); *State v. Meinert*, 225 Kan. 816, 817, 594 P.2d 232 (1979)." (231 Kan. at p.532, App. C, p.24a.)

No doubt the above rules are correct, except when First Amendment rights are involved. A statute which appears to restrict First Amendment freedoms does not have as strong a presumption of validity, the State has the burden of establishing that it has a compelling interest justifying restriction of those freedoms and it is not enough that the State show a rational relationship of the statute to a colorable state interest.[25] Here Appellees made no showing of such compelling interest, and the Courts below did not impose that burden on them.

**II. The Courts below erred in refusing to permit Appellants to present the defense of prosecutorial discrimination.**

As above stated, the trial court held, on the day before trial, the equal protection defense of prosecutorial discrimination was not recognized in Kansas, and instructed Ap-

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25. See, e.g., *Minielly v. State*, 242 Or. 490, 411 P.2d 69, 28 A.L.R.3d 705, 714-715 (1966) and cases of this Court therein cited.

pellants that they could not offer any testimony or exhibits in support of that defense. Consistent with that ruling, the trial court had previously refused to permit Appellants discovery of certain statistical information in support of the defense.

This Court has clearly held that the equal protection clause of the Fourteenth Amendment does prohibit enforcement of any law in an invidious and discriminatory fashion.[26] To establish the defense, it is generally held that a defendant must show: (1) that others similarly situated are generally not prosecuted for conduct similar to that for which the defendant is prosecuted; (2) that defendant has been intentionally singled out for prosecution; and (3) that such selection is based on an invidious or arbitrary criterion.[27]

The Kansas Supreme Court conceded that the trial court had erred in its ruling that the defense of discriminatory prosecution was not available to Appellants:

> "Clearly a constitutionally based claim such as discriminatory prosecution should always be available to a defendant. To hold, as the trial court did here, that separation of powers prohibits a defendant from asserting this defense is to ignore the very constitution from which this doctrine is derived." (231 Kan. at p.529, App. C, p.20a.)

Given this ruling, the Court should have reversed and granted Appellants the opportunity to prove the defense at

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26. *Yick Wo v. Hopkins*, 118 U.S. 356, 30 L.Ed. 220, 6 S.Ct. 1064 (1886); *Ah Sin v. Wittman*, 198 U.S. 500, 49 L.Ed. 1142, 25 S.Ct. 756 (1905); *Two Guys v. McGinley*, 366 U.S. 582, 6 L.Ed.2d 551, 81 S.Ct. 1135 (1961); *Oyler v. Boles*, 368 U.S. 448, 7 L.Ed.2d 446, 82 S.Ct. 501 (1962); *Cameron v. Johnson*, 390 U.S. 611, 20 L.Ed.2d 182, 88 S.Ct. 1335 (1968).

27. Annotation at 95 A.L.R.3d 280, 287.

a new trial. The Court did not do so. Instead, it held that the trial court's ruling, though erroneous, was nonetheless correct because it found Appellants had failed to show that "colorable entitlement" to the defense which some courts have held must be demonstrated before *discovery* is allowed.[28] The Court blithely ignored the fact that the trial court not only refused discovery, but also refused to allow Appellants to present any evidence at trial in support of the defense of prosecutorial discrimination.

Even assuming that Appellants were not entitled to discovery,[29] the Kansas Supreme Court does not, and cannot, explain how this would justify denying Appellants the right to present testimony and exhibits at the *trial* in support of the defense. The prosecutorial discrimination defense is hollow indeed if the Court, while conceding Appellants' rights to assert the defense, may deny them any opportunity to prove it.

The issue is not whether Appellants could have established the defense. Rather, the issue is whether the refusal of the Courts below to grant them the opportunity to do so denies Appellants equal protection of the law.

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28. 231 Kan. at p.529, App. C, p.20a.)

29. Appellants did demonstrate "colorable entitlement" to the defense (R., Vol. 2, p.64) even though neither the trial court nor Appellees ever indicated that such colorable entitlement was required.

## CONCLUSION

For the reasons stated above, the issues here presented are substantial and probable jurisdiction should be noted.

Respectfully submitted,

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# APPENDIX TO JURISDICTIONAL STATEMENT

## APPENDIX A:

### Trial Court's Findings and Conclusions

"IN THE
DISTRICT COURT OF THOMAS COUNTY, KANSAS

Case No. 80-C-48

STATE OF KANSAS, ex rel., Perry Murray and
Robert T. Stephan,
Plaintiffs,

vs.

HAROLD R. PALMGREN, et al.,
Defendants.

FINDINGS and CONCLUSIONS

This case was tried to the Court and taken under advisement pending submission of proposed findings of fact and conclusions of law by counsel which have been submitted as of July 21, 1981.

This action brought by the State of Kansas against individual members of the Board of County Commissioners of Thomas County, Kansas and individual members of the Board of Hospital Trustees of the Thomas County Hospital seeks the imposition of statutory civil penalties of $500.00 each for violation of the Kansas Open Meeting Act (KOMA), K.S.A. 75-4317, et seq. Plaintiff's Amended Petition alleges that on five separate occasions, as charged in Counts I, II, III, V, and VIII, individual members of the Commissioners and/or Trustees knowingly agreed and pre-

arranged among themselves to meet for the purpose of discussing the business of affairs of said board.

*COUNT I.* *Defendants Charged*:

County Commissioners; Harold Palmgren, William Randall and John Renner.

Thomas County Hospital Trustees; Eugene Karlin, Harold Upchurch and Lloyd Theimer.

*Date of Alleged Meeting*:

On or about November 3, 1979.

*Place of Meeting*:

Thomas County Hospital, Colby, KS.

*COUNT II.* *Defendants Charged*:

Hospital Trustees; Eugene Karlin, Harold Upchurch, Samuel Friesen and Lloyd Theimer.

*Date of Alleged Meeting*:

On or about November 23, 1979.

*Place of Meeting*:

Medical Center, Goodland, KS.

*COUNT III.* *Defendants Charged*:

Hospital Trustees; Eugene Karlin, Harold Upchurch, and Lloyd Theimer.

*Date of Alleged Meeting*:

On or about November 30, 1979.

*Place of Meeting*:

Medical Center, Colby, KS.

*COUNT V.* *Defendants Charged:*

Hospital Trustees; Harold Upchurch, Lloyd Theimer, Eugene Karlin, Woodrow Kemp, and Samuel Freisen.

*Date of Alleged Meeting:*

On or about December 17, 1979.

*Place of Meeting:*

"The Little Cafe," Oakley, KS.

*COUNT VIII.* *Defendants Charged:*

Hospital Trustees; Harold Upchurch, Lloyd Theimer, Marilyn Rall, and Woodrow Kemp.

*Date of Alleged Meeting:*

On or about March 10, 1980.

*Place of Meeting:*

Thomas County Hospital, Colby, KS.

In addition to the Findings, Conclusions and Orders announced of record during the course of the pretrial and trial proceedings, I find and conclude further as follows:

Upon the adoption of the original KOMA, the Kansas Legislature announced in 1972:

> In recognition of the fact that a representative government is dependent upon an informed electorate, it is declared to be the policy of this state that meetings for the conduct of governmental affairs and the transaction of governmental business be open to the public. K.S.A. 75-4317(a).

K.S.A. 75-4317(a) defined 'meeting,' as:

> . . . any prearranged gathering or assembly by a majority of a quorum of the membership of a body or agency subject to this (act) for the purpose of discussing the business or affairs of the body or agency.

The State has the burden of proof and to establish a claim that a meeting occurred in violation of KOMA, the State must show the following as to each Count:

1. a meeting of a body or agency subject to the act occurred;
2. a majority of a quorum of the members were present;
3. the meeting was prearranged;
4. the meeting was conducted for the purpose of discussing the business or affairs of the body;
5. the meeting was not open to the public;
6. the acts complained of were knowing and intentional.

In addition, K.S.A. 75-4320(a) provides a separate violation for any member of a body or agency subject to KOMA, 'who intentionally fails to furnish information as required by subsection (b) of K.S.A. (1980 Supp.) 75-4318' (notice and agenda upon request).

The completion of the pretrial proceedings left remarkably few facts in dispute. The defendants do not deny that gatherings occurred at the times and places alleged by the State, that a majority of a quorum was present, and that notices were not furnished. Defendants do deny that any of the gatherings were 'meetings' covered by the act.

The facts in controversy generally bear upon nature of the gatherings and the purpose, nature and extent of discussions and proceedings which occurred.

I find and conclude as a matter of law that both the Thomas County Board of County Commissioners and the Thomas County Hospital Board of Trustees are governmental bodies or agencies subject to the provisions of the Open Meetings Act.

The remaining questions as to each claimed violation is whether these gatherings constituted prearranged meetings conducted for the purpose of discussing the business or affairs of the body or agency and which were not open to the public.

The time during which the gathering complained of occurred were troubled times in Thomas County.

The record shows that all of the alleged violations occurred during a period of intense controversy and debate over the 'hospital issue'. Public opinion in Thomas County was sharply divided with strong emotional feelings on both sides.

The defendants found themselves taking an unpopular stand on the 'hospital issue' and meetings of the Boards were often disturbed by irate citizens. Meetings of the Hospital Board became so heated that the Board's Recording Secretary was instructed by her husband not to attend the meetings.

The defendants' make claims of good faith, of lack of knowledge and information as to the specific requirements of the Open Meetings Act, of their efforts to properly conduct their public duties and lack of any intent to violate the law. These claims do not appear relevant or material so far as they bear on the question of whether the act was violated.

The general intent of the law is clear. The legislature has mandated that 'THE TRANSACTION OF GOVERNMENTAL BUSINESS IS TO BE OPEN TO THE PUBLIC.' K.S.A. 75-4317(a).

The term 'open' meeting is common language. 'Open' is synonymous with 'unclosed.' To open means to render accessible or available. *Blacks Law Dictionary.*

MEETINGS SUBJECT TO THE ACT INCLUDE ALL GATHERINGS AT ANY AND ALL STAGES OF THE DECISION-MAKING PROCESS. *Coggins v. Public Employees Relations Board,* 2 Kan. App. 2d. 416, 581 P. 2d. 817 (1978).

From all the facts and circumstances, I find that the State has sustained its burden of proof that the gatherings at the Hospital in Colby on November 3rd and at the Medical Center in Goodland on November 23rd and November 30th were prearranged by members of the governmental bodies or agencies involved; conducted for the purpose of discussing the business or affairs of the body; and were not open to the public.

The record does not show that the acts of the defendants on these occasions were committed with any intent to violate the Open Meetings Act. However, proof that an intentional or knowing violation occurred does not require the State to prove a specific intent to violate the act but only that the defendants knowingly and intentionally did the acts prohibited by the law.

I therefore find and conclude that the State has sustained its burden of proof on the violations as alleged in Counts I, II, and III.

As to Count V, the gathering at the 'Little Cafe' in Oakley on December 17, 1979, I find that it was arranged

by a member of the public. The Trustees in attendance were responding to an invitation from their public. The record fails to show that the defendants gathered for engaging in any stage of the decision-making process.

I find the State has failed to sustain its burden of proof on this count and it should be dismissed.

As to Count VIII, the meeting of the Hospital Board's Finance Committee on March 12, 1980, I find that the purpose of the meeting was to expidite disposition of the vast number of bills routinely before the Board at their regular meetings. The group is designated as a Finance 'Committee'. However, the record shows that in sorting through the mass of bills involved and performing their assigned task, the Trustees functioned individually. The function is shown to be a means of internal organization of matters to be disposed of at a subsequent Board Meeting, an organization of matters on which decisions are to be later considered and made by the Board rather than being a stage of the decision-making process itself.

I find the State has failed to sustain its burden of proof on Count VIII and it should be dismissed.

The State has sustained its burden of proof of violations by the defendants as follows:

In Count I: County Commissioners; Harold Palmgren, William Randall and John Renner. Thomas County Hospital Trustees; Eugene Karlin Harold Upchurch and Lloyd Theimer.

In Count II: Hospital Trustees; Eugene Karlin, Harold Upchurch, Samuel Friesen and Lloyd Theimer.

In Count III: Hospital Trustees; Eugene Karlin, Harold Upchurch, and Lloyd Theimer.

The civil penalty statute is K.S.A. 75-4320 and it provides:

> 'Any member of a body or agency subject to this act who knowingly violates any of the provisions of this act or who intentionally fails to furnish information as required by subsection (b) of K.S.A. 75-4318 shall be liable for the payment of a civil penalty in an action brought by the attorney general or county or district attorney, in a sum set by the court or not to exceed five hundred dollars ($500) for each violation. . . .'

Factors to be considered in the assessment of penalties vary according to the peculiar circumstances of each case.

Some of the factors to be considered in this case are that none of the defendants retain the public offices they held at the time of the violations. Intent to violate the law is not established. The defendants claim good faith attempt to comply with the law and lack of and inability to obtain specific advice and information as to its requirements. The defendants acts were not intended to, nor did they result in any personal financial profit for themselves. Other than as to the conduct involved in this case it is obvious that all defendants fit the description—'A good and law-abiding citizen.'

This case has been of wide interest and the subject of massive publicity. It, like most litigation, has been traumatic and costly.

It is my considered judgment that the State's purpose of obtaining compliance with the laws has already been accomplished at this time. However, the civil statutes contain no provision similar to the suspension of sentence provisions of the criminal code. The statutes provide only for the assessment of 'a sum set by the court. . .'

The legitimate purpose to be served by the assessment of a fine in a criminal case or a monetary penalty in a civil case is the deterrence of the prohibited conduct by the offender in the future and by the imposition of that penalty deter commission of violations by others.

The production of revenue for the government is not a legitimate aim or purpose for the assessment of fines or civil penalties. Punishment by fine for the sake of punishment only is contrary to the public policy of the State of Kansas.

The assessment of penalty in an amount even approaching the maximum would be an abuse of judicial discretion. Accordingly, I find that under the circumstances of this case, civil penalty in the sum of $10.00 should be assessed to each defendant on each count with the court costs to be taxed to and paid by the defendants.

DATED: August 7, 1981.

/s/ M. V. Hoobler
M. V. Hoobler
District Judge (Assigned)"

## APPENDIX B: Trial Court's Judgment Form

"IN THE
DISTRICT COURT OF THOMAS COUNTY, KANSAS

---

Case No. 80-C-48

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STATE OF KANSAS, ex rel., Perry Murray and
Robert T. Stephan,
Plaintiff,

vs.

HAROLD R. PALMGREN, et al.,
Defendant.

---

JUDGMENT FORM

On this 7th day of August, 1981, judgment is entered as follows:

In accordance with the findings and conclusions as stated in the Court Reporter's records and in the written findings dated August 7, 1981, that: violations of the Kansas Open Meetings Act were committed by:

Harold Palmgren, William Randall, John Renner, Eugene Karlin, Harold Upchurch and Lloyd Theimer as claimed in COUNT I;

Eugene Karlin, Harold Upchurch, Samuel Friesen and Lloyd Theimer as claimed in COUNT II: and,

Eugene Karlin, Harold Upchurch and Lloyd Theimer as charged in COUNT III.

That the remaining Counts are dismissed.

That civil penalty of $10.00 is assessed to each defendant on each of the COUNTS I, II, and III.

The court costs are taxed to the defendants.

Leave is granted for counsel to submit journal entry if needed or desired.

/s/ M. V. Hoobler
M. V. Hoobler
Judge of the District Court
(Assigned)

copies:

Perry Murray, County Attorney
Steven Carr, Assistant Attorney General
Allen Shelton, Attorney at Law"

## APPENDIX C: Opinion of Kansas Supreme Court

No. 53,612

STATE OF KANSAS, *ex rel.*, Perry Murray and Robert T. Stephan, *Appellees* v. HAROLD R. PALMGREN, *et al.*, *Appellants.*

### SYLLABUS BY THE COURT

1. CRIMINAL LAW—*Defense of Discriminary Prosecution.* Discriminatory prosecution is recognized as a valid defense to a criminal prosecution based on the Equal Protection Clause of the Fourteenth Amendment.

2. SAME—*Defense of Discriminatory Prosecution—Proof Required.* To be successful, a defendant alleging discriminatory prosecution must show (a) others similarly situated to defendant are generally not prosecuted, and (b) the defendant has been intentionally and purposefully singled out for prosecution on the basis of an arbitrary or invidious criterion.

3. SAME—*Defense of Discriminatory Prosecution—Discovery.* Before discovery is allowed in support of the defense of discriminatory prosecution, a defendant must prove a "colorable entitlement" to the defense.

4. PUBLIC OFFICERS AND EMPLOYEES—*Kansas Open Meetings Act—Purpose.* The Kansas Open Meetings Act, K.S.A. 75-4317 *et seq.*, was enacted for the public benefit and is therefore construed broadly in favor of the public to give effect to its specific purpose.

5. STATUTES—*Constitutionality.* The constitutionality of a statute is presumed; all doubts must be resolved

in favor of its validity; it must clearly appear there is a constitutional violation before a statute is stricken; the court's duty is to uphold the statute under attack if there is any reasonable way to so construe it.

6. SAME—*Noncriminal Statutes—Constitutionality.* Where a noncriminal statute is set out in terms the ordinary person exercising ordinary common sense can sufficiently understand and comply with, the statute is not unconstitutionally vague.

7. *SAME—Constitutionality—Overbreadth.* An overbroad statute is one where (a) the protected activity is a significant part of the law's target and (b) there exists no satisfactory method of severing the law's constitutional from its unconstitutional applications.

8. PUBLIC OFFICERS AND EMPLOYEES—*Kansas Open Meetings Act.* All prearranged gatherings by a majority of a quorum of legislative and administrative bodies, agencies of the state, political and taxing subdivisions thereof, including boards, commissions, authorities, councils, committees, subcommittees and other subordinate groups thereof, receiving or expending and supported in whole or in part by public funds shall be open to the public when the purpose of the gathering is to discuss, conduct or transact the business or affairs of the body or agency.

9. SAME—*Kansas Open Meetings Act—Effect on Subordinate Groups of Publicly Funded Political Bodies.* So long as the parent state or local body meets the public funding test, all subordinate groups are automatically covered by the Kansas Open Meetings Act, regardless of the degree or existence of public funding.

10. SAME—*Kansas Open Meetings Act—"Knowing" violation—Specific Intent Not Required.* To "knowingly"

violate the act means to purposefully do the acts denounced by the Kansas Open Meetings Act and does not contemplate a specific intent to violate the law. K.S.A. 75-4320(*a*).

11. SAME—*Kansas Open Meetings Act—Violation—Civil Penalties.* In an action for civil penalties for violation of the Kansas Open Meetings Act it is *held*: Defendants, consisting of a majority of a quorum of two governmental groups, attended three prearranged meetings for the purpose of discussing, conducting and transacting the business and affairs of the groups, in violation of the act, and are subject to civil penalties therefor.

Appeal from Thomas district court; MORRIS V. HOOBLER, judge. Opinion filed June 11, 1982. Affirmed.

*Allen Shelton*, of Clark & Shelton, of Hill City, argued the cause and was on the brief for the appellants.

*Robert T. Stephan*, attorney general, argued the cause and *Perry Murray*, county attorney, *Steven Carr*, assistant attorney general, and *Dan Biles*, assistant attorney general, were with him on the brief for the appellees.

*Louis M. Clothier*, assistant county attorney, of Leavenworth, was on the brief *amicus curiae* for the Kansas County and District Attorneys Association.

The opinion of the court was delivered by

HERD, J.: This is an action by the State of Kansas, *ex rel.*, Perry Murray, Thomas County attorney and Robert T. Stephan, attorney general, to recover civil penalties under K.S.A. 75-4320(*a*) from the appellants, former county commissioners and hospital trustees in Thomas County, for violation of the Kansas Open Meetings Act (KOMA). K.S.A. 75-4317 *et seq.*

This case is the continuation of an intense and bitter controversy over the proposed construction of a new hospital in Thomas County. The dispute is familiar to this court. Decisions in *Pratt v. Board of Thomas County Comm'rs*, 226 Kan. 333, 597 P.2d 664 (1979), and *Thomas County Taxpayers Ass'n v. Finney*, 223 Kan. 434, 573 P.2d 1073 (1978), set aside two county bond elections for hospital construction because of legal irregularities and effectively halted construction of a tax-supported hospital in Thomas County. Following the last decision a group of Thomas County residents gave up the quest for a tax-supported hospital and began searching for an alternate method of providing medical care for the county. They formed a non-profit corporation and launched a fund drive for the building of a private non-profit hospital. During this time Harold Palmgren William Randall and John Renner made up the Board of County Commissioners. Samuel Friesen, Eugene Karlin, Woodrow Kemp, Marilyn Rall, Lloyd Theimer and Harold Upchurch sat on the county hospital board of trustees, members of which are appointed by the county commission. These public officials opposed the construction of a new hospital. They sought to frustrate the construction of the non-profit hospital by preparing a proposal for remodeling the existing county hospital.

In furtherance of their plan, on November 3, 1979, the three commissioners, along with trustee Theimer, Upchurch and Karlin, met with an architect, John Shaver of Salina, to discuss Shaver's work on a preliminary energy audit and the possibility of obtaining federal funds for energy-related improvements to Thomas County Hospital. The meeting was requested by the architect. Upchurch took the lead in notifying the commissioners and trustees. The time was set for 10:00 a.m., November 3, 1979. The

meeting was held according to plan and resulted in a letter from Shaver to the commissioners notifying them he had informed the Kansas Energy Office they were interested in obtaining federal energy funds for the hospital. The application was completed, awaiting official approval prior to filing.

There are two other meetings complained of in the State's petition. They occurred on November 23 and November 30, 1979, and were the result of the trustees' dissatisfaction with the hospital management under Hospital Affiliates International (HAI). Coincidentally, HAI supported the building of the non-profit hospital.

On November 23 four of the hospital trustees journeyed to Goodland in Karlin's car and met with Bill Wilson, administrator of the Northwest Kansas Medical Center. During the meeting attended by Wilson on the one hand and Karlin, Theimer, Upchurch and Friesen on the other, they discussed their plans to terminate HAI. They also inquired of Wilson's management policies, philosophy and experience as a hospital administrator and asked if he would be interested in administering their hospital.

Wilson expressed interest but advised the trustees he would not offer them a contract while HAI was providing management services. In spite of his statement, the next day Wilson discussed the trustees' proposal with Northwest's attorney and requested him to draft a contract accordingly. Wilson also discussed the Thomas County proposal with his board which authorized him to enter into a ninety-day contract.

On November 27, the appellant trustees met in an open meeting and voted unanimously to terminate the HAI contract. There was no discussion. On November 29 the attorney for Northwest submitted the proposed contract to Wilson.

The next meeting complained of occurred on November 30, 1979. It also took place in Goodland where trustees Karlin, Theimer and Upchurch met with Wilson. Once again the topic for discussion was the possibility of contracting with Wilson to manage Thomas County Hospital, now that the HAI was terminated. Wilson was asked to present his contract proposal to the full board of trustees. Appellant Karlin, chairman of the trustees, testified the Goodland meetings were prearranged and were for the purpose of "looking for an administrator" for the hospital.

The trial court found all the meetings were prearranged, not open to the public, held for the purpose of discussing the business or affairs of the body and attended by a majority of a quorum, thus violating KOMA. The county commissioners and trustee Friesen were fined $10 each for attending one meeting. Karlin, Upchurch and Theimer were fined $30 each for attending all three meetings. Rall and Kemp who attended none of the meetings were absolved. Costs were taxed to appellants. They appeal.

Appellants first complain the trial court erred in refusing to permit discovery in support of their defense of discriminatory prosecution. They filed a Request for Production of Documents asking for all files, reports, documents, tapes, transcripts, field notes, and all other documents in the office of the attorney general or county attorney of Thomas County which in any way relate to any investigation or complaint of alleged violations of the KOMA from 1972-80. They also requested all documents relating to investigations of alleged violations of the KOMA by the Kansas Corporation Commission (KCC) and officials in Galena and Wichita. Finally, they requested all tapes, video or audio, transcripts, press releases, position statements or similar items disseminated to any news-

paper, magazine, radio or television station in Kansas in which the attorney general discussed KOMA or any investigation of violations thereof and all tapes, statements and transcripts of a TV program from Wichita titled "Access."

The trial court denied the motion.

In January 1981 appellants served appellees with the following interrogatories:

> "Interrogatory No. 1. State the number of complaints received by your office alleging violations of KOMA since its enactment, and with reference thereto, state:
>
> "A. The number of complaints received during your term of office:
>
> "B. The number of complaints investigated in some manner by your office, and of those investigated, state the number of complaints investigated by the KBI.
>
> . . . .
>
> "Interrogatory No. 3. Regarding such complaints or requested opinions, state the number of instances since the enactment of KOMA, in which it was determined by your office, either formally or informally, that at least a 'technical' violation of KOMA had occurred. With regard to such instances, state:
>
> "A. The number of such apparent violations resulting in the filing of legal proceedings by your office, giving the date of filing, the Court where filed, and the style and number of each such case;
>
> "B. As to each such legal action instituted, state the legal remedy sought by your office in such proceeding;

"C. Identify each such legal action where either civil or criminal penalties were sought;

"D. State the criteria or circumstances distinguishing each apparent violation resulting in legal proceedings from those apparent violations where no such proceedings were instituted."

The State filed a motion for a protective order on the grounds the trial court had previously denied the request for production of documents which pertained to the same material covered by the interrogatories. It also claimed the information requested was neither relevant nor material and to furnish it would burden the attorney general's office. After argument at pretrial, the trial court granted the protective order and ruled appellants were barred from asserting the defense of discriminatory prosecution under the doctrine of separation of powers.

The discretion whether or not to prosecute has long been the sacred domain of the prosecutor and stems from the common law *nolle prosequi*. *State v. Greenlee*, 228 Kan. 712, 717, 620 P.2d 1132 (1980). Nevertheless, discriminatory prosecution is now generally recognized to constitute a valid defense to a criminal charge. Annot., 95 A.L.R.3d 280, 296.

To be successful, a defendant alleging discriminatory prosecution must show: 1) Others who are similarly situated are not generally prosecuted for conduct similar to that for which defendant is being prosecuted, and 2) the defendant has been intentionally and purposefully singled out for prosecution on the basis of an arbitrary or invidious criterion. Annot., 95 A.L.R.3d at 287. See also *Barton v. Malley*, 626 F.2d 151, 155 (10th Cir. 1980). The defense is solidly based on the Equal Protection Clause of the 14th Amendment. See *Yick Wo v. Hopkins*, 118 U.S.

356, 30 L.Ed. 220, 6 S.Ct. 1064 (1886). Mere failure to enforce the law against other violators, however, does not establish a claim of discriminatory prosecution. *Oyler v. Boles*, 368 U.S. 448, 7 L.Ed.2d 446, 82 S.Ct. 501 (1962); *Gladen v. State*, 196 Kan. 586, 590, 413 P.2d 124 (1966).

Clearly a constitutionally based claim such as discriminatory prosecution should always be available to a defendant. To hold, as the trial court did here, that separation of powers prohibits a defendant from asserting this defense is to ignore the very constitution from which this doctrine is derived. Granted, the decision whether or not to prosecute is most often solely that of the prosecutor. This decision, however, must be made with constitutional limits on discretion in mind. When the decision purports to deny a defendant his basic constitutional rights, it is up to the judiciary to weigh the prosecutor's adherence to constitutional principles. See *Marbury v. Madison*, 5 U.S. 49, 1 Cranch 137, 2 L.Ed. 60 (1803).

Even though the trial judge's reasoning was erroneous, he reached the correct result. Most federal courts have held a defendant must prove a "colorable entitlement" to the defense of discriminatory prosecution before discovery is allowed. This procedure is used to avoid the use of the defense as a means of obtaining information to which a defendant is otherwise not entitled. *United States v. Murdock*, 548 F.2d 599, 600 (5th Cir. 1977). See also *United States v. Johnson*, 577 F.2d 1304, 1309 (5th Cir. 1978); *United States v. Berrios*, 501 F.2d 1207, 1211 (2d Cir. 1974); *United States v. Berrigan*, 482 F.2d 171, 181 (3rd Cir. 1973). The test, the 5th Circuit Court of Appeals has said, "is materiality, the court is entitled to have the defendant demonstrate the materiality of what he seeks by proving a colorable entitlement to the defense before discovery is allowed." *Murdock*, 548 F.2d at 600. Support

for this position is found in K.S.A. 60-226(b)(1) which states: "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . ."

Here there was no showing by appellants of a colorable entitlement to the defense. No specific instances of other violations of the KOMA were ever supplied to the trial court. There is no showing of abuse of discretion. The issue is without merit.

Appellants next argue KOMA is a penal statute and must be construed strictly against the State, which the trial court failed to do.

K.S.A. 75-4320(a) provides up to $500 in civil penalties may be assessed against any person who violates the act. Appellants argue since the KOMA threatens a monetary penalty for its violation, it must be considered a penal statute and therefore strictly construed. Indeed, Black's Law Dictionary 1289 (4th ed. 1951) defines penal as "containing a penalty." This court has long adhered to the rule a penal statute should be strictly construed. See, *e.g.*, *State v. Kearns*, 229 Kan. 207, 208, 623 P.2d 507 (1981); *State v. Doyen*, 224 Kan. 482, 488, 580 P.2d 1351 (1978). Thus, if the KOMA can be characterized as penal, it might arguably be strictly construed. This theory, however, flies in the face of the purpose of the KOMA, stated in K.S.A. 75-4317(a): "In recognition of the fact that a representative government is dependent upon an informed electorate, it is declared to be the policy of this state that meetings for the conduct of government affairs and the transaction of governmental business be open to the public." Obviously, the intent behind the statute is to protect the public. In *Johnson v. Killion*, 178 Kan. 154, 158-59, 283 P.2d 433 (1955), this court stated: "It is fundamental that where a statute is designed to protect

the public, the language must be construed in the light of the legislative intent and purpose and is entitled to a broad interpretation so that its public purpose may be fully carried out." See also *Smith v. Marshall*, 225 Kan. 70, 75, 5[illegible] P.2d 320 (1978).

Other courts have used various methods of reaching the conclusion an act providing for civil penalties should be liberally construed. In *State v. O'Neill Investigations, Inc.*, 609 P.2d 520 (Alaska 1980), the Alaska Supreme Court dealt with that state's Unfair Trade Practices and Consumer Protection Act. Even though the Act provided for a civil penalty of up to $5,000 the court held the statute was not penal and thus should not be strictly construed. The court found the legislature's characterization of the penalty as civil made the statute remedial and subject to a broad interpretation. (Two other justices concurred, stating that because the statute's thrust was regulatory rather than criminal it should not be strictly construed.) Similarly, in *State v. Strong Oil Co., Inc.*, 105 Misc.2d 803, 433 N.Y.S.2d 345 (1980), the court interpreted a state statute designed to discourage price gouging by merchants of home heating oil, stating, "[W]here a statute is found to be beneficial to the public, though penal as to some persons, it will receive an equitable construction in order not to defeat its general as well as its specific purpose." Finally, in *State v. Hamilton*, 388 So. 2d 561, 563 (Fla. 1980), the court began its examination of state environmental protection legislation with the principle, " 'A statute enacted for the public benefit should be construed liberally in favor of the public even though it contains a penal provision.' *City of Miami Beach v. Berns*, 245 So. 2d 38, 40 (Fla. 1971)."

Other states with open meetings acts have construed their statutes broadly. In *Board of Public Instruction of*

*Broward Co. v. Doran*, 224 So. 2d 693, 699 (Fla. 1969), the Florida Supreme Court stated: "The fact that the statute contains a penal provision does not make the entire statute penal so that it must be strictly construed." Statutes enacted for the public benefit, the Florida court said, must be interpreted favorably to the public. See also *Wolfson v. State*, 344 So. 2d 611, 613 (Fla. Dist. Ct. App. 1977); *Laman v. McCord*, 245 Ark. 401, 404, 432 S.W.2d 753 (1968).

Finally, a recent amendment to the KOMA is further evidence the act should be liberally interpreted. K.S.A. 1981 Supp. 75-4320a(*b*) discourages any comparison with criminal actions, stating: "In any action hereunder, the burden of proof shall be on the public body or agency to sustain its action."

We hold the KOMA is remedial in nature and therefore subject to broad construction in order to carry out the stated legislative intent.

Appellants next contend the KOMA is unconstitutionally vague and overbroad. They argue a broad construction of the act will insure this result. Pertinent parts of the act are as follows:

K.S.A. 75-4317a:

> "**Meeting defined.** As used in this act, 'meeting' means any prearranged gathering or assembly by a majority of a quorum of the membership of a body or agency subject to this act for the purpose of discussing the business or affairs of the body or agency."

K.S.A. 1981 Supp. 75-4318:

> "**Meetings of state and subdivisions open to public; exceptions; secret ballots; notice; agenda, cameras, photographic lights, recording devices.** (*a*) Except as other-

wise provided by state or federal law or by rules of the house or senate, and except with respect to any impeachment inquiry or other impeachment matter referred to any committee of the house of representatives prior to the report of such committee to the full house of representatives, all meetings for the conduct of the affairs of, and the transaction of business by, all legislative and administrative bodies and agencies of the state and political and taxing subdivisions thereof, including boards, commissions, authorities, councils, committees, subcommittees and other subordinate groups thereof, receiving or expending and supported in whole or in part by public funds shall be open to the public and no binding action by such bodies shall be by secret ballot, but any administrative body that is authorized by law to exercise quasi-judicial functions shall not be required to have open meetings when such body is deliberating matters relating to a decision involving such quasi-judicial functions."

Let us first consider the rules of construction on the constitutional challenge of a statute. We have stated on innumerable occasions the constitutionality of a statute is presumed; all doubts must be resolved in favor of its validity, and before a statute may be stricken it must clearly appear there is a constitutional violation. We have gone on to say, in determining constitutionality, it is the court's duty to uphold the statute under attack rather than defeat it. If there is any reasonable way to construe the statute as constitutionally valid, it should be done. Statutes are not stricken unless the infringement of the superior law is clear beyond a reasonable doubt. *Von Ruden v. Miller*, 231 Kan. 1, 642 P.2d 91 (1982); *In re Brooks*, 228 Kan. 541, 543, 618 P.2d 814

(1980); *State v. Huffman*, 228 Kan. 186, 189, 612 P.2d 630 (1980); *Colby Distributing Co. v. Lennen*, 227 Kan. 179, 186-87, 606 P.2d 102 (1980); *State v. Meinert*, 225 Kan. 816, 817, 594 P.2d 232 (1979).

Against this background let us examine the rules regarding vagueness and overbreadth:

> "The test to determine whether a criminal statute is unconstitutionally void by reason of being vague and indefinite is whether its language conveys a sufficiently definite warning as to the conduct proscribed when measured by common understanding and practice. If a statute conveys this warning it is not void for vagueness. Conversely, a statute which either requires or forbids the doing of an act in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application is violative of due process. At its heart the test for vagueness is a commonsense determination of fundamental fairness." *State v. Kirby*, 222 Kan. 1, 4, 563 P.2d 408 (1977).

See also *State v. Meinert*, 225 Kan. at 817; 16A Am. Jur. 2d, Constitutional Law § 818 at p. 988. The test for noncriminal statutes is essentially the same. See *Broadrick v. Oklahoma*, 413 U.S. 601, 37 L.Ed.2d 830, 93 S.Ct. 2908 (1973); *Keyishian v. Board of Regents*, 385 U.S. 589, 17 L.Ed.2d 629, 87 S.Ct. 675 (1967); *Jordan v. De George*, 341 U.S. 223, 95 L.Ed. 886, 71 S.Ct. 703, *reh. denied* 341 U.S. 956 (1951). The standards of certainty in a statute punishing for criminal offenses, however, are higher than in those depending primarily upon civil sanction for enforcement. *State v. Conley*, 216 Kan. 66, 67, 531 P.2d 36 (1975); *State v. Hill*, 189 Kan. 403, 411, 369 P.2d 365 (1962). For example, in *In re Brooks*, 228 Kan. at 544, we held standards for judging the vagueness of statutes

pertaining to termination of parental rights should rest somewhere between the rigid standards governing criminal statutes and the more flexible rules regarding statutes which regulate business. Where a noncriminal statute is set out in terms the ordinary person exercising ordinary common sense can sufficiently understand and comply with, the statute is not unconstitutionally vague. *CSC v. Letter Carriers,* 413 U.S. 548, 37 L.Ed.2d 796, 93 S.Ct. 2880 (1973); *Harris v. McRae,* 448 U.S. 297, 311 n. 17, 65 L.Ed.2d 784, 100 S.Ct. 2671, *reh. denied* 448 U.S. 917 (1980).

Finally, it should be noted that where First Amendment rights are involved, "stricter standards of permissible statutory vagueness" apply to a statute, *i.e.,* the government may regulate in this area only with narrow specificity. *Smith v. Goguen,* 415 U.S. 566, 573, 39 L.Ed.2d 605, 94 S.Ct. 1242 (1974); *Smith v. California,* 361 U.S. 147, 151, 4 L.Ed.2d 205, 80 S.Ct. 215 (1959); *State v. Stauffer Communications, Inc.,* 225 Kan. 540, 546, 592 P.2d 891 (1979).

While a vague statute leaves persons of common intelligence to guess at its meaning, an overbroad statute makes conduct punishable which under some circumstances is constitutionally protected. *State v. Huffman,* 228 Kan. at 189; *State v. Stauffer Communications, Inc.,* 225 Kan. at 547. Obviously, almost every law is potentially applicable to constitutionally protected acts. A successful overbreadth challenge can thus be made only when 1) the protected activity is a significant part of the law's target, and 2) there exists no satisfactory method of severing that law's constitutional from its unconstitutional applications. See Tribe, American Constitutional Law § 12-24, p. 711 (2nd ed. 1978).

The challenge for overbreadth can be easily dismissed. Appellants argue the KOMA has a potential inhibiting effect on the "rights of public officials to assemble and discuss public affairs." It is urged citizens have the right to unfettered discussion of governmental affairs in private while retaining anonymity. Appellants' claim reveals a basic misconception regarding the nature of a public official's position. The First Amendment does indeed protect private discussions of governmental affairs among citizens. Everything changes, however, when a person is elected to public office. Elected officials are supposed to represent their constituents. In order for those constituents to determine whether this is in fact the case they need to know how their representative has acted on matters of public concern. Democracy is threatened when public decisions are made in private. Elected officials have no constitutional right to conduct governmental affairs behind closed doors. Their duty is to inform the electorate, not hide from it. The KOMA places no constraints on purely private discussions by public officials. It regulates only the conduct of public business. As such the KOMA is not unconstitutionally overbroad.

Let us now turn to appellant's constitutional challenge of KOMA based on vagueness. Their first claim of vagueness comes from a comparison of K.S.A. 75-4317a and K.S.A. 1981 Supp. 75-4318. K.S.A. 75-4317a clearly defines a meeting as "any prearranged gathering . . . .. for the purpose of discussing the business or affairs of the body or agency." While K.S.A. 1981 Supp. 75-4318 states all meetings "for the conduct of the affairs of, and the transaction of business by" such a body or agency shall be open to the public. Appellants argue it is impossible to determine what type of meeting of public officials must be open. They claim the restrictive language of K.S.A.

1981 Supp. 75-4318 implies "binding action" is necessary before a meeting comes under the act. We do not agree. K.S.A. 75-4317a and K.S.A. 1981 Supp. 75-4318 shall be read together. They are not incompatible. We construe the two sections to mean all prearranged gatherings by a majority of a quorum of all legislative and administrative bodies, agencies of the state and political and taxing subdivisions thereof, including boards, commissions, authorities, councils, committees, subcommittees, and other subordinate groups thereof, receiving or expending and supported in whole or in part by public funds shall be open to the public when the purpose of the gathering is to discuss, conduct or transact the business or affairs of the body or agency. American Heritage Dictionary of the English Language 278 (2nd ed. 1969), defines "conduct" as: "To direct the course of; manage; control." Similarly, "transact" is defined as: "To do, carry out, perform, manage, or conduct . . . ." p. 1362. The two terms are essentially synonymous. When examined in light of the legislative purpose set out in the initial section of KOMA no vagueness exists. Words such as "discuss," "conduct," and "transact" should be construed according to the legislative purpose of the statute and the approved usage of the language. Since they are words in common usage they should be given their natural and ordinary meaning. *Coe v. Security National Ins. Co.*, 228 Kan. 624, 629-30, 620 P.2d 1108 (1980). As such, an average person exercising ordinary common sense can understand the words sufficiently to comply with the act. See generally, Tacha, *The Kansas Open Meeting Act: Sunshine on the Sunflower State?* 25 Kan. L. Rev. 169 (1977); Smoot and Clothier, *Open Meetings Profile: The Prosecutor's View*, 20 Washburn L.J. 241 (1981). We hold the words "discuss," "conduct," and "transact," as used in the act, are not vague.

Next appellants argue the act is vague as to the governmental groups covered. They maintain it is unclear whether "subordinate groups thereof," such as the board of trustees of a county hospital, must receive and expend public funds themselves to be included in the act or whether it is enough that only the parent body, such as the board of county commissioners, receive and expend public funds. Smoot and Clothier suggest the following test to determine what public body falls within the ambit of KOMA:

> "First the group of people meeting together must be a 'body or agency' within the meaning of the Act. Second, the group must have legislative or administrative powers or at least be legislative or administrative in its method of conduct. Third, the body must be part of a governmental entity at the state or local level, whether it is the governing body or some subordinate group. Fourth, it must receive or expend public funds or be a subordinate group of a body subject to the Act. Finally, it must be supported in whole or in part by public funds or be a subordinate group of a body which is so financed." 20 Washburn L.J. at 256-57.

Professor Tacha's article removes any doubt regarding the "public funds" terminology:

> "If the section were interpreted as it grammatically should be, so long as the parent state or local body meets the public funding test, all subordinate groups would automatically be covered by the Act regardless of the degree or existence of public funding." 25 Kan. L. Rev. at 186.

The Thomas County Board of County Commissioners receives and expends public funds; the board of trustees

of the Thomas County Hospital is a "subordinate group thereof" and is therefore covered by KOMA. We hold the KOMA is not unconstitutionally vague.

Appellants next argue the trial court's finding: "The record does not show that the acts of the defendants on these occasions were committed with any intent to violate the open meetings act," eliminates them from penalties under K.S.A. 75-4320(*a*). That statute provides:

> "Any member of a body or agency subject to this act who knowingly violates any of the provisions of this act or who intentionally fails to furnish information as required by subsection (*b*) of K.S.A. 75-4318 shall be liable for the payment of a civil penalty in an action brought by the attorney general or county or district attorney, in a sum set by the court of not to exceed five hundred dollars ($500) for each violation."

Appellants maintain that they were advised by the county attorney their meetings were not covered by KOMA and that a "good faith" violation is in fact not a violation at all. This argument flies in the face of an impressive body of authority and the ancient maxim, "Ignorance of the law is no excuse." Further, appellants' interpretation of the statute is not in accord with Kansas law.

In *State v. Millhaubt*, 144 Kan. 574, 581, 61 P.2d 1356 (1936), a criminal prosecution, the court stated:

> "Where the statute defines the duties of a county officer and specifies acts he shall not do, if he intentionally does certain of those acts, and their being done is prohibited, he intentionally violates the law."

Appellee makes a further comparison to criminal statutes:

"Analogously, this Court should note the Kansas prosecutor's burden in criminal prosecutions is to establish a general criminal intent as an essential element of every crime defined by the criminal code, by proof of 'willful conduct.' K.S.A. 21-4301(1). 'Willful conduct' is defined as

> . . . conduct that is purposeful and intentional and not accidental. As used in this code (criminal code), the terms *'knowing,'* 'intentional,' 'purposeful,' and 'on purpose' are included within the term 'willful.' K.S.A. 21-3201(2). (Emphasis supplied.)

Moreover, proof of 'criminal intent' does not require proof of knowledge of the existence or constitutionality of the statute under which the accused is prosecuted, *or the scope or meaning of the terms used in that statute.* K.S.A. 21-3202(1). (Emphasis supplied.)

"Accordingly, in *State v. Hodge,* 204 Kan. 98, 460 P.2d 596 (1969), the Court rejected defendant's argument that the term 'willfully violates' as it was used in the Kansas Securities Act required proof of a specific intent to violate the securities law to obtain a conviction. The Court stated: 'No specific intent is is necessary to constitute the offense where one violates the securities act *except the intent to do the act denounced by the statute.*' 204 Kan. at 107. (Emphasis supplied.) The Court further noted, 'all that is required is proof that the person acted intentionally in the sense that he was aware of what he was doing . . . .' 204 Kan. at 108 and Syllabus 10."

Thus, it is logical not to set more stringent standards in a case imposing civil penalties than those imposed in a criminal prosecution.

Appellants knowingly held three prearranged meetings for the purpose of discussing, conducting and transacting governmental affairs and business. A majority of a quorum of the governmental body was present each time but none of the three meetings were open to the public. Appellants violated the Act and are subject to its penalties. This issue is without merit.

Appellants next argue the trial court did not specify the State's burden of proof and, no matter what standard of proof is used, the State did not meet its burden.

It should be noted that K.S.A. 1981 Supp. 75-4320a (b), not in effect during the time periods relevant to this case, now states "the burden of proof shall be on the public body or agency to sustain its action." Certainly, then, something less than the criminal standard of beyond a reasonable doubt was intended.

Even under the strictest standard, however, the evidence is sufficient to support the trial court. To prove its case the State had to show: 1) A meeting of a body or agency subject to the act occurred; 2) a majority of a quorum of the members were present; 3) the meeting was prearranged; 4) the meeting was conducted for the purpose of discussing, conducting, or transacting the business or affairs of the body or agency; and 5) the meeting was not open to the public. As the foregoing evidence clearly demonstrates there was substantial evidence to support the State's case. The issue is without merit.

Appellants next argue the trial court erred in refusing to admit certain exhibits into evidence. The excluded exhibits fall into two categories. Group One supports appellants' defense of discriminatory prosecution. It consists of exhibits 2, 3, 12A and 12D. Exhibit 2 includes letters from appellants Rall and Theimer to the attorney

general complaining of violations of KOMA by official boards in Thomas County. Exhibit 3 is a reply to exhibit 2 by an assistant attorney general. Exhibits 12A and 12D are letters from appellant Rall to the Board of County Commissioners of Thomas County and the Board of Trustees of Thomas County Hospital, requesting notice of all meetings of the boards. This evidence was offered to prove the instant action was filed for political reasons to force appellants to resign from office, which they did.

Under K.S.A. 60-401(*b*) and 407(*f*), all relevant evidence is admissible. Relevancy is a matter of logic and experience and the trial court naturally possesses a certain amount of discretion in this area. *Farmers Ins. Exchange v. Schropp*, 222 Kan. 612, 624, 567 P.2d 1359 (1977); *State v. Faulkner*, 220 Kan. 153, 155, 551 P.2d 1247 (1976). The trial court properly excluded the evidence. The self-serving letters written by appellants to the attorney general after the investigation in this case had begun are irrelevant to the issue of discriminatory prosecution.

Group Two is exhibit 1 and consists of all the attorney general's opinions concerning the KOMA and was offered to prove the KOMA is vague and overbroad. At the time the exhibit was offered, the court had already ruled on vagueness and overbreadth. The exclusion of the exhibit was proper.

Finally, appellants contend the trial court erred in assessing the costs of the action against all of the appellants when two were not found in violation of the act. We construe the trial court's order to assess the costs against the appellants adjudged in violation of the act.

The judgment of the trial court is affirmed.

FROMME, J., dissenting. The community fight in Thomas County between opposing factions was and is

regrettable. The present action brought by the attorney general to recover so-called civil penalties for alleged knowing violations of the open meetings law against former public officials is but another chapter in that local community fight. This court is taking no sides in this bitter controversy other than to examine the provisions of the open meetings law and apply those provisions to the facts as they come to us in a printed record. I do not agree that this record of proceedings justifies the conclusion of the majority that these defendants "sought to frustrate the construction of the non-profit hospital by preparing a proposal for remodeling the existing county hospital." The words "sought to frustrate" attribute some improper motive to the decisions of these defendants while acting as public officials.

All of us agree that elected officials cannot be permitted to conduct governmental affairs behind closed doors. That did not occur under the facts appearing in the record of this case. All of us agree that public officials do have a duty to inform their constituents and not to hide from them. Here again the evidence in this record established no secret meetings and no one testified to having been excluded from any meeting.

The penalties for the crimes of which these public officials were convicted were assessed under the open meetings law. They were imposed against these former members of two separate public bodies—the Board of County Commissioners and the Board of County Hospital Trustees.

The county clerk, Rosalie Seemann, testified it was her duty to notify the members of the Board of County Commissioners and the members of the public concerning the time, place and purpose of meetings. She further

testified that she was never advised not to give notice of any meeting.

Edna Hansen testified she was the administrative and recording secretary for the Board of Trustees of the hospital. It was her practice to give notice of meetings of the Board of Trustees by notifying the newspaper, The Colby Free Press, and the local radio station, KXXX, when she was advised of a meeting by the chairman. She further testified that she had received some 42 letters requesting personal notice of meetings of the board, and because of the time and expense involved in giving personal notice the board adopted a practice to respond personally only when self-addressed and stamped envelopes were provided. The 42 letter-requests were not received by her until after the November 3, 1979, meeting.

It was stipulated that no notices were given of the meetings which formed the bases for the penalties in this case. I do not believe these gatherings were meetings required to be open with advance public notice as contemplated by the open meetings law. Neither do I believe that in these meetings the affairs of these bodies were conducted and business transacted as contemplated by K.S.A. 1981 Supp. 75-4318.

The first meeting was hurriedly called at the request of a Mr. Shaver from Salina who had previously been consulted in regard to a possible energy audit. He contacted Mr. Upchurch of the Board of Trustees. Upchurch in turn passed the word around that Architect Shaver wanted to talk the next day to some of the county commissioners and some members of the Board of Trustees at the hospital building to gather information for energy application forms. The members of both boards, who were notified and could attend, met in the Thomas County Hospital. The building and plant were surveyed and Mr.

Shaver obtained information to fill out the forms. No final decision for hiring of Shaver to file the application was agreed on until a later meeting of the Board of County Commissioners held on November 7, 1979, after notice was given to the public by the county clerk.

The second and third so-called meetings were held by members of the Board of Trustees of the Thomas County Hospital in the Northwest Kansas Medical Center at Goodland, Kansas. The public officers went to Goodland to interview a man for the position of administrator of the Thomas County Hospital. No one was hired, either then or later.

In all three of these meetings no binding action was taken, the meetings occurred in public buildings, and I can find nothing in the record to indicate a single person was turned away from the door.

The penalty provision of the Kansas Open Meetings Act reads as follows:

> "(*a*) Any member of a body or agency subject to this act *who knowingly violates* any of the provisions of this act *or who intentionally fails* to furnish information as required by subsection (*b*) of K.S.A. 75-4318 shall be liable for the payment of a civil penalty in an action brought by the attorney general or county or district attorney, in a sum set by the court of not to exceed five hundred dollars ($500) for each violation. In addition, *any binding action* which is taken at a meeting not in substantial compliance with the provisions of this act *shall be voidable* in any action brought by the attorney general or county or district attorney in the district court of the county in which the meeting was held within ten (10) days of the meeting, and the court shall have jurisdiction

to issue injunctions or writs of mandamus to enforce the provisions of this act.

"(*b*) Civil penalties sued for and recovered hereunder by the attorney general shall be paid into the state general fund. Civil penalties sued for and recovered hereunder by a county or district attorney shall be paid into the general fund of the county where the proceedings were instigated." K.S.A. 75-4320. Emphasis supplied.

I note the action which is considered voidable under this penalty provision is referred to as any "binding action." I further note that, although the penalty is referred to as a civil penalty, a violation subjects the violator to a class C misdemeanor punishable by a civil penalty or fine of not to exceed $500.00.

The act provides for notice as follows:

"(*b*) Notice of the date, time and place of any regular or special meeting of a public body designated hereinabove shall be furnished *to any person requesting such information,* except that:

"(1) If notice is requested by petition, the petition shall designate one person to receive notice on behalf of all persons named in the petition, and notice to such person shall constitute notice to all persons named in the petition; and

"(2) if notice is furnished to an executive officer of an employees' organization or trade association, such notice shall be deemed to have been furnished to the entire membership of such organization or association.

"(*c*) It shall be the duty of the presiding officer or other person calling the meeting, if the meeting

is not called by the presiding officer, to furnish the information required by subsection (*b*).

"(*d*) Prior to any meeting hereinabove mentioned, any agenda relating to the business to be transacted at such meeting shall be made available *to any person requesting said agenda.*" K.S.A. 1981 Supp. 75-4318. Emphasis supplied.

The above provision raises some question as to whether a "knowing violation" of the act occurred in the present case in the absence of a request for the information in advance of the meetings. The secretary to the Board of Trustees of the hospital received 42 letters of request for notice of time, place, and meeting agenda for all regular, special, and executive session meetings. However, none of these were dated or received before the November 3rd meeting which was the basis for convictions under Count I.

Be that as it may, my disagreement with the majority stems from the expansion of the term "open meeting" to all meetings. Although "meeting" is defined in K.S.A. 75-4317a to include any prearranged gathering of a majority of the membership for the purpose of discussing the business or affairs of the body, this does not require a construction that every such "meeting" is to be an "open meeting." If such were the case, the three county commissioners could not legally arrange to eat lunch together.

K.S.A. 1981 Supp. 75-4318 is the section of the act which says what meetings must be open to the public. That section of the statute limits the "open meeting" to "all meetings for the conduct of the affairs of, and the transaction of business." It should be noted that the section covering the penalties, K.S.A. 75-4320, refers only to this section of the statute. The penalty section does

not mention or impose penalties for meetings as defined in 75-4317a.

I cannot believe it was intended to prevent members of public bodies from attending emergency meetings for which there is little or no opportunity for advance public notice. They also should be permitted to attend meetings to interview prospective employees living in a neighboring city. Surely the public would have no right to insist on accompanying the officials when they conduct such interviews. Especially should this kind of trip be permitted when no "binding action" is contemplated and none taken. To hold otherwise, a public body could not take care of emergency matters. Closed executive sessions require a formal motion acted on at a regular called meeting. K.S.A. 1981 Supp. 75-4319. There would be no opportunity to call the required meeting necessary to act on the motion for executive session.

The open meetings law was not passed to prevent public bodies from attending to emergency matters when it is impossible to give advance notice. If no "binding action" is taken until later at a regular called meeting open to the public I can see no violation. Such was the evidence in the present case.

The use of a criminal penalty for enforcement of the open meetings law in this case, instead of the remedies of mandamus and injunctive relief, did nothing to further open meetings in Thomas County. These former members of public bodies are no longer in office. Under the majority opinion the present officers could be fined for violating this law for failure to give notice. So-called civil penalties in this case are nothing less than fines assessed against former public officers. It is quite apparent that some of these misdemeanants attended other similar meetings on the advice of the county attorney.

Even the county attorney did not understand that all gatherings were subject to the penalties of the open meetings law. Prior to today this court had never decided that question. The penalty provision of the law requires a knowing violation but under the majority opinion a violation occurs regardless of intent to violate the act.

I feel the construction placed upon this act by the majority opinion is much too restrictive. It will not permit public officials to act in emergencies. It will not permit them to carry out ordinary personal fact-finding tours. It will not permit public officials to conduct employee interviews in the prospective employee's usual and customary environment. The open meetings law was never meant to be so restrictive and I respectfully dissent.

**APPENDIX D: Order of Kansas Supreme Court Denying Motion for Rehearing**

"IN THE
SUPREME COURT OF THE STATE OF KANSAS

---

No. 81-53612-AS

---

State of Kansas, et al.,
Appellees,

v.

Harold R. Palmgren, et al.,
Appellants.

---

You are hereby notified of the following action taken in the above entitled case:

Motion by Appellants for Rehearing.

DENIED.

Date July 15, 1982

Yours very truly,

LEWIS C. CARTER
Clerk, Supreme Court"

## APPENDIX E: Notice of Appeal

"NO. 81-53612-AS

IN THE SUPREME COURT OF THE
STATE OF KANSAS

---

STATE OF KANSAS, ex rel., Perry Murray and
Robert T. Stephan,
Plaintiffs-Appellees,

vs.

HAROLD R. PALMGREN, et al.,
Defendants-Appellants.

---

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

---

Notice is hereby given that Appellants Harold R. Palmgren, William J. Randall, John A. Renner, Samuel Friesen, Eugene J. Karlin, Lloyd E. Theimer and Harold E. Upchurch hereby appeal to the Supreme Court of the United States from the final order of the Supreme Court of Kansas entered July 15, 1982, denying Appellants' Motion for Rehearing of the opinion filed June 11, 1982, affirming the decision of the District Court of Thomas County, Kansas.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

CLARK & SHELTON, P.A.
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By: /s/ Allen Shelton

CERTIFICATE OF SERVICE

The undersigned, Allen Shelton, a member of the Bar of the Supreme Court of the United States, and one of the attorneys of record for Appellants, hereby certifies that on September 10, 1982, pursuant to Rule 33, Rules of the Supreme Court, he served the above and foregoing Notice of Appeal to the Supreme Court of the United States, by depositing a copy thereof in the United States Mail, first class postage prepaid, properly addressed, to each of the following:

Hon. Robert T. Stephan
Attorney General
2nd Floor, Kansas Judicial Center
Topeka, Kansas 66612

and

Perry Murray
County Attorney
P. O. Box 455
Colby, Kansas 67701
Attorneys for Appellees

All parties required to be served thus have been served.

CLARK & SHELTON, P.A.
Attorneys for Appellants
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(913) 674-2129

By: /s/ Allen Shelton"

Filed in the Kansas Supreme Court on September 13, 1982.

Office - Supreme Court, U.S.
FILED
NOV 12 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-640

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1982

STATE OF KANSAS, ex rel. PERRY MURRAY
and ROBERT T. STEPHAN,

Appellees,

vs.

HAROLD R. PALMGREN, et al.,

Appellants.

On Appeal From The Supreme Court Of Kansas

# MOTION TO DISMISS

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November 9, 1982

## QUESTION PRESENTED

Does this appeal from the Supreme Court of the State of Kansas present a substantial federal question?

## PARTIES TO THE PROCEEDINGS

APPELLEES ARE:

Robert T. Stephan
Attorney General of Kansas

Perry Murray
County Attorney of Thomas County, Kansas

APPELLANTS ARE:

Harold R. Palmgren
William J. Randall
John A. Renner
Samuel Friesen
Eugene J. Karlin
Lloyd E. Theimer
Harold E. Upchurch

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No. 82-640

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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1982

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STATE OF KANSAS, ex rel. PERRY MURRAY
and ROBERT T. STEPHAN,

Appellees,

vs.

HAROLD R. PALMGREN, et al.,

Appellants.

---

On Appeal From The Supreme Court Of Kansas

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**MOTION TO DISMISS**

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## MOTION TO DISMISS

COMES NOW the appellee, the State of Kansas, ex rel., Perry Murray and Robert T. Stephan, by and through its counsel of record, Dan Biles, Assistant Attorney General, and moves this Court for an order of dismissal, pursuant to Supreme Court Rule 16.1(b). A dismissal of this appeal is justified in that this case fails to present a substantial federal question. As outlined below, appellee believes this appeal is not deserving of a large investment of this Court's time and, the claims of appellants are foreclosed by prior decisions of this Court.

WHEREFORE, appellee prays this Court dismiss this appeal.

## STATEMENT OF FACTS

This appeal is a continuation of an action filed by the State of Kansas on relation of Perry Murray, Thomas County Attorney, and Robert T. Stephan, Attorney General, to recover civil penalties from the appellants for violations of the Kansas Open Meetings Act (KOMA), K.S.A. 75-4317, et seq. The appellants were all former elected county commissioners and appointed county hospital trustees of Thomas County. This case concerns three separate meetings among the appellants during November of 1979.

The trial court found all three meetings were prearranged, not open to the public, held for the purpose of discussing the business or affairs of the body and attended by a majority of a quorum, thus violating the KOMA. The county commissioners (appellants Harold R.

Palmgren, William J. Randall, and John A. Renner) and hospital trustee Samuel Friesen, were fined $10 each by the trial court for attending one meeting. Appellants Eugene J. Karlin, Harold E. Upchurch, and Lloyd E. Theimer, who were all hospital trustees, were fined $30 each for attending all three meetings. Costs were taxed to appellants. The Kansas Supreme Court affirmed.

This case arises out of an intense and bitter political controversy which raged in Thomas County for many years over the proposed construction of a new hospital. On two occasions the Kansas Supreme Court was the forum of disputes involving challenges to construction of a new, county-owned hospital. The court's decisions in Thomas County Taxpayers Ass'n. v. Finney, 223 Kan. 434, 573 P.2d 1073 (1978) and Pratt v. Board of Thomas County Commissioners, 226 Kan. 333, 597

P.2d 664 (1979), effectively halted construction of a tax-supported hospital in this western Kansas community. Many of the appellants in this action were among the prime movers and litigants in both of those suits, including Lloyd Theimer, Harold Upchurch, and Samuel Friesen.

The new hospital proposal enjoyed overwhelming community support, as reflected in the results of two elections approving the proposal by wide margins, but nullified on other grounds by the above-cited decisions. Following the Pratt decision, a group of Thomas Countians formed a nonprofit corporation and launched a fund drive for the building of a private, nonprofit hospital in the county. By the Fall of 1979, several hundred thousand dollars were raised or pledged and the nonprofit hospital project was well underway. But, these appellants sought to thwart this latest effort

at building a new hospital in Thomas County.

In the Fall of 1979, they moved swiftly, sometimes secretly, in their official capacities as members of the Thomas County Board of County Commissioners (Commissioners) and the Thomas County Board of Hospital Trustees (Trustees), to try to sabotage the new hospital drive.

In a series of secret meetings of the two boards, the appellants gathered to discuss, and apparently to decide, their future course of official action as Trustees and Commissioners on two important and highly controversial items of county business concerning the "hospital issue." First, they sought to frustrate, if not defeat altogether, the construction of the nonprofit hospital by moving quickly to prepare a proposal and draw plans for remodeling the existing

county hospital in hopes of convincing state health officials of the lack of need for a new hospital in Thomas County. To this end, in mid-October, 1979, the Commissioners (appellants Harold Palmgren, William Randall, and John Renner) interviewed a number of architects in public meetings to discuss with them the drawing of plans and specifications for remodeling the existing hospital. (R., State's Exhibit 1.)

One of the architects interviewed, John Shaver of Salina, Kansas, met a second time with the Commissioners, and with three Trustees, appellants Theimer, Upchurch, and Eugene Karlin, on Saturday, November 3, 1979. However, this meeting was not public, and constitutes one of the violations of the Kansas Open Meetings law found by the lower courts. During this non-public meeting, the Commissioners and the three Trustees

gathered privately to discuss with Shaver his work on a preliminary energy audit and the possibility of obtaining federal funds for energy-related improvements to the Thomas County Hospital.

Each of the appellants was informed and understood he would be meeting with Shaver to discuss the architect's work and the possibility of getting an energy grant to make improvements to the existing hopsital. (R., Trial Transcript, pp. 94-100; 163-165; 286-291; 321-322; 340-344; 440-442; 483-484.) Commissioner Palmgren testified the Commissioners were "in the process of trying to hire an architect" and he attended the meeting in his official capacity to inform himself about Shaver and do his "homework" about county business. (R., Trial Transcript, p. 184.)

In a letter dated November 7, 1979, Shaver wrote the Commissioners in-

forming them he had notified the Kansas Energy Office the Commissioners were interested in obtaining federal energy funds for the Thomas County Hospital, Shaver had completed all of the energy audit forms, and Shaver was awaiting the Commissioners' "official" approval to make the energy grant application on their behalf. (R., State's Exhibit 6.) The minutes of the Board of County Commissioners, also dated November 7, 1979, reflect the decision of the Commissioners in a public meeting to authorize Shaver to proceed with a grant application on behalf of the County. The minutes indicate the vote was without any discussion by the Commissioners and that "the grant application has already been done" as of November 7, 1979. (R., State's Exhibit 1.) Later that month, the Commissioners voted to hire Shaver to prepare plans and specifications for remodeling the hospital.

(R., State's Exhibit 1.) Shaver's contract proposal was dated November 2, 1979. (R., State's Exhibit 5.)

The second important item of county business discussed in secret meetings of the Trustees pertained to management of the existing hospital. A corporation known as Hospital Affiliates International (HAI) was administering the hospital under a long-term management contract between HAI and the Trustees. The Trustees were unhappy with HAI, primarily because of HAI's public expressions of support for the nonprofit hospital effort, and HAI's previous endorsements of the earlier proposals for a new hospital. (R., State's Exhibit 2.) Appellant Trustees gathered privately on two occasions to discuss plans to terminate the HAI management and to seek a new administrator.

The appellant Trustees twice traveled in Karlin's automobile to Good-

land, Kansas, to meet with Bill Wilson, administrator of the Northwest Kansas Medical Center, the Goodland hospital. These meetings constitute the second and third violations of the Act found by the courts. During these meetings on November 23, 1979, and on or about November 30, 1979, the appellant Trustees Karlin, Theimer, Upchurch, and Friesen (Friesen attended the November 23 meeting only) discussed with Wilson their dissatisfaction with HAI. In addition, they inquired into Wilson's management policies, philosophies and experiences as a hospital administrator. They asked him if he would be interested in serving as administrator, or in providing management services, at the existing Thomas County Hospital. (R., Trial Tr., pp. 1350-368.)

Wilson expressed interest, but he told the Trustees he would not offer them a contract so long as HAI was pro-

viding services. (R., Trial Tr., pp. 537-539.) Nonetheless, the next day Wilson talked to the Goodland hospital board's attorney and asked him to draft a contract for providing management services to the Thomas County hospital board. (R., Trial Tr., pp. 504-505 and State's Exhibit 10.) Two days later, November 26, 1979, Wilson discussed the matter with his own board of trustees in a special meeting called for that purpose. The Goodland board of trustees voted unanimously to authorize Wilson to enter into a ninety-day management contract with the Thomas County Hospital board during this meeting. (R., Trial Tr., pp. 544-548, and Defendants' Exhibit 8.)

The next day, November 27, in an open public meeting of the Thomas County Board of Trustees, the Board voted unanimously to rescind the HAI management contract, without discussion among the

board members. (R., State's Exhibit 2.) On November 29, 1979, the Goodland board's attorney completed a management contract and submitted it to Wilson. (R., Trial Tr., pp. 1504-509.)

On or about November 30, 1979, the appellant Trustees Karlin, Theimer, and Upchurch, returned to Goodland to meet with Wilson where, once again, the topic of discussion between them was the possibility of Wilson serving as administrator, or providing management services, now that HAI's contract was terminated. (R., Trial Tr., pp. 1350-368.) At about this same time, one of the Trustees asked Wilson to present his contract proposal to the full board. (R., Trial Tr., pp. 554-555.)

Appellant Karlin, who was chairman of the Board of Trustees at this time, testified unequivocally that the Trustees in attendance discussed with

Wilson, and among themselves, their dissatisfaction with HAI, and they inquired of Wilson if he would be interested in administering the Thomas County Hospital. (R., Trial Tr., pp. 1355-359, 361, 365, 368.) As Karlin simply stated it, "We were looking for an administrator." (R., Trial Tr., p. 359.)

Karlin further testified the Goodland meetings were prearranged and on both occasions the Trustees traveled together in Karlin's automobile. And, despite appellants' contentions that they made no effort to hide the fact they were gathering together on all of these occasions in "public" places, the weight of the evidence contradicts them. They failed to notify the then-chairman of the Trustees, David Jennings, and three other Trustees about the meeting on November 3 with Shaver, and, according to one witness, they met behind closed doors. (R.,

Trial Tr., pp. 151-152.) The Goodland meetings took place in a private conference room and in Wilson's private office. (R., Trial Tr., pp. 356, 361.) It was undisputed that none of the appellants gave any notice of any of these meetings to the Colby Free Press, the local newspaper, which was customarily notified of all meetings of both boards. (R., Trial Tr., pp. 33-34; 57-59.) And, though the Trustees had, prior to November 23, 1979, received numerous letters from citizens specifically requesting notice of all regular and special meetings of the Board of Trustees (R., State's Exhibit 4), it was conceded no notice was given of the two Goodland meetings. Several of the letters requesting notice of meetings made express reference to the Kansas Open Meetings Act. (R., State's Exhibit 4.)

## ARGUMENT

Applied to the specifics of this case, appellants are contending they, as a group, have a First Amendment right to secretly interview an architect or a hospital administrator for jobs to be financed by public funds; and to secretly review a proposed energy grant which also would be publicly funded. This argument ignores that appellants, as a group, were meeting in their official capacities and taking care of "county business" by promoting energy grants and searching for new administrators. All of this was being done secretly to further one side of a very controversial public issue in the community--construction of a new county hospital or preservation of the existing facility.

It must be emphasized that above all, the "county business" is the public's business. By actively seeking

election to the Commission or appointment to the hospital board, appellants freely assumed whatever limitations co-exist with the honor of serving as the public's representatives. The Commissioners and Trustees were not required to run for office. They should not now be heard to complain about its restrictions. A common sense reading of the KOMA, however, reveals that the "open meeting" provision does not prohibit informal association. A plain reading of the statute, however, does reveal that appellants were not permitted, as they did here, to secretly congregate for the purpose of interviewing architects and administrators for publicly-supported employment, or to secretly review and launch applications for publicly-sponsored energy grants.

Of greater bearing on the constitutional rights of speech and association is the well-settled principle that

time, place, and manner restrictions on speech and association are valid and proper when in the public interest. As this Court stated in Grayned v. City of Rockford, 408 U.S. 104 (1972):

> Clearly, government has no power to restrict (expression) because of its message. Our cases make equally clear, however, that reasonable "time, place and manner" regulations may be necessary to further significant governmental interests, and are permitted. Id., at 115. (Citations omitted.)

In the case now before this Court, the KOMA does not in any way prohibit the discussion and deliberation of public business by appellants. It does direct that public business be discussed at a time, place, and manner in which the public may attend. Thus, while the KOMA does regulate in the public interest the time, place, and manner in which public officials, serving in their official capacities, discuss public business, it

does not violate their rights of speech or association.

Appellee is aware of only one other appellate decision concerning a litigant's constitutional attack of an "open meetings" law on First Amendment grounds. In Dorrier v. Dark, 537 S.W.2d 888 (1976), the Supreme Court of Tennessee dismissed this constitutional attack, just as the Kansas Supreme Court did in the action now on appeal. There, the Tennessee court said:

> The only legitimate "chilling effect upon free expression" (appellant's phrase) that a member of a covered body could entertain is that deliberation in open meeting of a particular matter would be detrimental to the public interest. The people, speaking through the Legislature, have determined that they are willing to assume those detriments to secure the benefits of open government as prescribed in the Act. We are not impressed by the argument that a citizen-member of a governing body suffers an infringement of his right to free speech by the requirement that any deliberation toward an official decision must be conducted openly. Id., at 892.

As to appellants' argument that the KOMA is unconstitutionally vague and overbroad, appellee will simply refer this Court to the decision of the Kansas Supreme Court which directly addresses the issue. As to this, however, it should be pointed out that appellants frequently make use of imaginative hypotheticals aimed at creating an absurd effect in focusing ridicule on this open meetings statute. As this Court said in Anniston Mfg. Co. v. Davis, 301 U.S. 337 (1937):

> Constitutional questions are not to be decided hypothetically. Id., at 353.

Besides tending to confuse the issues, hypotheticals are further frowned upon by the Court as a mode of asserting the vagueness of a statute, because "it will always be true that the fertile, legal imagination can conjure up hypothetical cases in which the meaning of disputed terms will be a nice question." Grayned

v. City of Rockford, supra, at 110, n. 15.

This Court, however, should not be sidetracked, since the facts of this particular case are central to the decision now being appealed. Both Kansas courts have not hesitated in concluding that appellants knowingly held three secret, prearranged meetings for the purpose of discussing "county business." Appellants violated the Act and are subject to its penalties.

As to appellants' final contention that the court below erred in refusing to permit them to present their defense of prosecutorial discrimination, this Court again is referred to the meticulous attention paid to this argument by the Kansas Supreme Court.

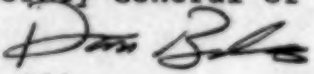
## CONCLUSION

This appeal does not present this Court with a substantial federal

question. The prior decisions of this Court adequately address the issues presented. Appellants, in their official capacities as elected and appointed county officials, met secretly to advance one side of a very controversial community issue. Their actions properly were found to be in violation of the Kansas Open Meetings Act.

Respectfully submitted,

ROBERT T. STEPHAN
Attorney General of Kansas



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## PROOF OF SERVICE

The undersigned, DAN BILES, a member of the Bar of this Court and counsel of record for Appellee herein, hereby certifies that on the 9th day of November, 1982, he caused to be served foregoing Motion to Dismiss on Appellants in this appeal, by mailing three (3) copies thereof by ordinary mail, first class postage prepaid, addressed to their attorney, as follows:

ALLEN SHELTON
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